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REPORTS C# 3/8

OF

## CASES DETERMINED

BY THE

*New Brunswick*

## SUPREME COURT

OF

## NEW BRUNSWICK,

WITH

TABLES OF THE NAMES OF THE CASES DECIDED, AND OF THE  
NAMES OF THE CASES CITED, AND A DIGEST OF  
THE PRINCIPAL MATTERS.

REPORTER:

ARTHUR I. TRUEMAN, A. M., B. C. L.,  
BARRISTER-AT-LAW.

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**JUDGES**  
**OF THE**  
**SUPREME COURT OF NEW BRUNSWICK**  
**DURING THESE REPORTS.**

---

**THE HONORABLE SIR JOHN CAMPBELL ALLEN, Knt., C. J.**

"        "        **ANDREW RAINSFORD WETMORE.**

"        "        **ACALUS L. PALMER, Judge in Equity.**

"        "        **GEORGE E. KING.**

"        "        **JOHN JAMES FRASER.**

"        "        **WILLIAM HENRY TUCK.**

**ATTORNEY-GENERAL.**

**THE HONORABLE ANDREW G. BLAIR.**

**SOLICITORS-GENERAL.**

**THE HONORABLE ROBERT J. RITCHIE.**

"        "        **WILLIAM PUGSLEY.**



## ERRATA.

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**Page 336.**—In top line for “and as it is not,” read “and is it not.”

“ 425.—In line two of the headnote after the word “carried,”  
insert “over a bridge.”

“ 510.—From line seven of the headnote after the words “until  
November 25th,” omit the words “and March 31st.”

# TABLE OF CASES REPORTED

IN THIS VOLUME.

## B.

Baird, Clark <i>v.</i> . . . . .	620
——, <i>Ex parte</i> , . . . . .	162
——, ——— <i>In re</i> Steadman, . . . . .	200
——, Palmer <i>v.</i> . . . . .	42
Bank of British North America, Noonan <i>v.</i> . . . . .	119
Bank of Nova Scotia, Landry <i>v.</i> . . . .	564
Bickford, O'Doherty <i>v.</i> . . . . .	116
Buck, Smith <i>v.</i> . . . . .	268
Burpee <i>v.</i> Wetmore, . . . . .	487
Busby <i>v.</i> Schofield, . . . . .	407
Byram <i>v.</i> Johnston, . . . . .	572

## C.

Cameron <i>v.</i> Town of Moncton, . . . . .	372
Campbell <i>v.</i> McGregor, . . . . .	644
Caraquet Railway Co., Carney <i>v.</i> . . . .	425
Carney <i>v.</i> The Caraquet Rail- way Company . . . . .	425
Christie <i>v.</i> The City of Portland. . . . .	311
Clark <i>v.</i> Baird, . . . . .	620
—— <i>v.</i> Schofield, . . . . .	403
Cleveland, <i>In re</i> . . . . .	70
Corey, <i>Doe dem.</i> Keith <i>v.</i> . . . . .	287

## D.

Davidson, <i>Ex parte</i> , . . . . .	205
---------------------------------------	-----

## D.—*Con.*

<i>Doe dem.</i> Keith <i>v.</i> Corey . . . . .	287
Driscoll <i>v.</i> Mayor, etc., of Saint John, . . . . .	150

## F.

Fanjoy <i>v.</i> The City of Portland, . . . .	24
Flewelling, Inch <i>v.</i> . . . . .	570
Foley, <i>Ex parte</i> , . . . . .	113
Fredericton and St. Mary's Ry. Bridge Co., <i>Ex parte</i> , . . . . .	127

## G.

Gallagher <i>v.</i> The Municipality of Westmorland, . . . . .	217
Grieves, <i>Ex parte</i> , . . . . .	543
Grothe, Isaacs <i>v.</i> . . . . .	420

## H.

Halifax Banking Co. <i>v.</i> Smith, . . . . .	462
Harrison <i>v.</i> Northern and West- ern Railway Company, . . . . .	560
Herrington <i>v.</i> McBay, . . . . .	670

## I.

Inch <i>v.</i> Flewelling, . . . . .	570
Isaacs <i>v.</i> Grothe, . . . . .	420



J.	N.— <i>Con.</i>
Johnston, Byram <i>v.</i> ..... 572	Noonan <i>v.</i> Bank of British
Jones, McKean <i>v.</i> ..... 340	North America,..... 119
K.	Northern and Western Railway
Kelly, <i>Ex parte</i> , ..... 130	Co., Harrison <i>v.</i> ..... 560
——, ——, ..... 271	O.
L.	O'Brien <i>v.</i> Miller,..... 114
Landry <i>v.</i> Bank of Nova Scotia, 564	Ocean Marine Insurance Co.,
Leggett <i>v.</i> Young, ..... 675	Palmer <i>v.</i> ..... 501
Levesque <i>v.</i> New Brunswick	O'Doherty <i>v.</i> Bickford,..... 116
Railway Co., ..... 588	O'Leary <i>v.</i> The Pelican Ins. Co. 510
M.	Overseers of the Poor for the
Mayor, etc., of St. John, Dris-	Parish of Moncton <i>v.</i> Over-
coll <i>v.</i> ..... 150	seers of the Poor for the
——, Fredericton, Municipal-	French Inhabitants of
ity of York <i>v.</i> ..... 662	Moncton, ..... 632
Miller, O'Brien <i>v.</i> ..... 114	—— — French Inhabitants
Moncton (Town of), Cameron <i>v.</i> 372	of Moncton, Overseers of
Moore, Prescott <i>v.</i> ..... 295	the Poor for the Parish of
Municipality of York <i>v.</i> Mayor,	Moncton <i>v.</i> ..... 632
etc., of City of Fredericton. 662	P.
Muirhead, Stewart <i>v.</i> ..... 273	Palmer <i>v.</i> The Ocean Marine
Mc.	Insurance Co.,..... 501
McBay, Herrington <i>v.</i> ..... 670	—— <i>v.</i> Baird, ..... 42
McGregor, Campbell <i>v.</i> ..... 644	Pelican Ins. Co., O'Leary <i>v.</i> ... 510
McKean <i>v.</i> Jones, ..... 340	Portland (City of), Christie <i>v.</i> .. 311
McManus <i>v.</i> Wells, ..... 449	—— —, Fanjoy <i>v.</i> .... 24
N.	—— —, Williams <i>v.</i> ... 1
Neilson <i>v.</i> Neilson,..... 635	Prescott <i>v.</i> Moore ..... 295
New Brunswick Railway, Co.	R.
Levesque <i>v.</i> ..... 588	Ryan <i>v.</i> Turner and Lewis... 634
	S.
	Sayre <i>v.</i> Williams, ..... 531

S.— <i>Con.</i>	W.
Schofield, Busby <i>v.</i> ..... 407	Wallace, <i>Ex parte</i> , ..... 123
——, Clark <i>v.</i> ..... 403	Wells, McManus <i>v.</i> ..... 449
Shehan, <i>Ex parte</i> , ..... 133	Westmorland (Municipality of),
Smith <i>v.</i> Buck, .... 268	Gallagher <i>v.</i> ..... 217
——, Halifax Banking Co., <i>v.</i> 462	Wetmore, Burpee <i>v.</i> ..... 487
——, Turner and wife <i>v.</i> .... 567	Whalen, <i>Ex parte</i> , ..... 144
Steadman, <i>In re</i> ; <i>Ex parte</i> ,	Williams, Sayre <i>v.</i> ..... 531
Baird, ..... 200	——, <i>v.</i> The City of Portland, 1
Stewart <i>v.</i> Muirhead, ..... 273	
T.	Y.
Turner <i>v.</i> Smith, ..... 567	
——, Ryan <i>v.</i> ..... 634	Young, Leggett <i>v.</i> ..... 675



# TABLE OF CASES CITED

IN THIS VOLUME.

## A.

Abell v. Light, . . . . .	1 Han. 240, . . . . .	34
Abrath v. North Eastern Ry. Co., . . . . .	11 App. Cas. 247, . . . . .	232
Ackerley v. Parkinson, . . . . .	3 M. & S. 411, . . . . .	166
Adams v. Lancashire and Yorkshire Ry. Co. L. R. 4 C. P. 739, . . . . .		5
— v. St. Leger, . . . . .	1 Ba. & Be. 181 . . . . .	358
Agra and Masterman's Bank, <i>In re</i> , . . . . .	L. R. 2 Ch. 391, . . . . .	360
Albro v. Agawam Canal Co., . . . . .	6 Cush. 75, . . . . .	443
Allen, <i>Ex parte</i> , . . . . .	2 All. 424, . . . . .	164
— v. Hayward, . . . . .	7 Q. B. 960, . . . . .	657
— v. London and Southwestern Ry. Co., L. R. 6 Q. B. 65, . . . . .		231
Anderson v. Canadian Pacific Ry. Co., . . . . .	17 Ont. R. 747, . . . . .	614
Anthony v. Haney, . . . . .	8 Bing. 186, . . . . .	568
Arden v. Goodacre, . . . . .	11 C. B. 371, . . . . .	460
Argent v. Dean and Chapter of St. Paul's, 16 East 7, note <i>a</i> , . . . . .		243
Ashby v. Minnitt, . . . . .	8 A. & E. 121, . . . . .	296
Assop v. Yates, . . . . .	2 H. & N. 768, . . . . .	5
Atkinson v. Elliott, . . . . .	7 T. R. 378, . . . . .	564
— v. Hawdon, . . . . .	2 A. & E. 628, . . . . .	421
— v. Keith, . . . . .	5 All. 305, . . . . .	583
— v. Newcastle Waterworks Co., . . . . .	2 Exch. D. 441, . . . . .	593
Avery v. United States, . . . . .	12 Wall. 304, . . . . .	121
Ayliffe v. Murray, . . . . .	2 Atk. 58, . . . . .	359

## B.

Babcock v. Lawson, . . . . .	5 Q. B. D. 284, . . . . .	277
Bailey v. Wright, . . . . .	18 Ves. 49 <i>b</i> , . . . . .	79
Bainbridge v. Neilson, . . . . .	10 East 329, . . . . .	520
Baird, <i>Ex parte</i> : <i>In re</i> Ellis, . . . . .	27 N. B. Rep. 99, . . . . .	199, 204
Balfe v. West, . . . . .	13 C. B. 466, . . . . .	532
Bank of Australasia v. Harding, . . . . .	9 C. B. 661, . . . . .	584
Bank of British North America v. Strong, 1 App. Cas. 307, . . . . .		463
Bank of Hindustan, China and Japan, <i>In re</i> , . . . . .	L. R. 13 Eq. 178, . . . . .	211
Bank of New South Wales v. Owston, . . . . .	4 App. Cas. 270, . . . . .	242
Barker v. Braham, . . . . .	3 Wils. 368, . . . . .	586
— v. Palmer, . . . . .	8 Q. B. D. 9, . . . . .	166
Barnardiston v. Chapman, . . . . .	4 East 121, . . . . .	296

Barnes v. District of Columbia,.....	1 Otto 540, .....	244
—— v. White,.....	1 C. B. 192, .....	138
Barnett v. Brandao,.....	6 M. & G. 630, .....	565
Barton v. Williams,.....	5 B. & Ald. 395 ; 3 Bing. 139, ..	297
Barton's Hill Coal Co. v. Reid, .....	4 Jur. N. S. 767, .....	441
Bathurst (Borough of) v. Macpherson,...	4 App. Cas. 256, .....	317
Bateman, <i>In re</i> ,.....	L. R. 9 Eq. 660, .....	164
Bayley v. Manchester, Sheffield and Lin-		
colnshire Ry. Co.,.....	L. R. 8 C. P. 148, .....	26
Bedell v. Hoffman,.....	2 Paige 199, .....	359
Belk v. Broadbent,.....	3 T. R. 183, .....	586
Bell v. Moffat, .....	2 P. & B. 406, .....	403
Bempde v. Johnstone,.....	3 Ves. 198, .....	45
Berkley's Case,.....	Plowd. Comm. 225, .....	234
Bernina, The.....	12 P. D. 36, .....	446
Betts v. Kimpton, ...	2 B. & A. 273, .....	105
Biggs v. Eagles,.....	Stev. Dig. 1,245, .....	636
Birrell v. Dryer,.....	9 App. Cas. 345, .....	528
Bishop v. Corbet, .....	1 Lev. 253, .....	164
Black v. Doherty,.....	22 N. B. Rep. 215, .....	380
—— v. Municipality of Saint John, ...	23 N. B. Rep. 249, .....	247
Blackmore v. Vestry of Mile End, Old		
Town, .....	9 Q. B. D. 451, .....	374
Blades v. Higgs,.....	11 H. L. Cas. 621 ; 10 C. B. N. S.	
	713, .....	568
Blakslee v. St. John Water Co.,.....	1 All. 639, .....	601
Bliss v. Boeckh,.....	8 Ont. R. 451, .....	151
Blouin v. Corporation of Quebec,.....	7 Que. L. R. 12, .....	114
Blyth v. Birmingham Waterworks Co.,...	11 Exch. 781, .....	426
Booth v. Boston and Albany Ry. Co.,...	73 N. Y. 38, .....	447
Bothwell Case,.....	8 Can. S. C. R. 676, .....	169
Bourne v. Diggles,.....	2 Chit. R. 311, .....	624
Boyle v. The Town of Dundas,.....	25 U. C., C. P., 420, .....	314
Boyne, <i>Ex parte</i> , .....	22 N. B. Rep. 228, .....	166
Bradlaugh v. Gossett,.....	12 Q. B. D. 271, .....	171
Bradshaw v. Vaughton, .....	30 L. J., C. P. 93, .....	124
Breese v. Jerdein,.....	4 Q. B. 585, .....	328
Brewing v. Berryman, .....	2 Pugs. 515, .....	27
Bridges v. North London Ry. Co.,.....	L. R. 7 H. L. 213, .....	593
Brinsmead v. Harrison,.....	L. R. 6 C. P. 584 ; 7 C. P. 547, ...	411
Bromage v. Prosser,.....	4 B. & C. 247, .....	243, 580
Brown, <i>Ex parte</i> ,.....	24 N. B. Rep. 598, .....	121
Brown v. Bristol and Exeter Ry. Co.,...	7 H. & N. 1006, .....	26
—— v. The Accrington Cotton Spinning		
and Mfg. Co.,.....	34 L. J. Exch. 208, .....	426
—— v. The Eastern and Midlands Ry.		
Co., .....	22 Q. B. D. 391, .....	649
Browne v. Brockville and Ottawa Ry. Co.,	20 U. C., Q. B. 202, .....	596
Bruce v. Allen, .....	1 Madd. 556, .....	492
Bryson v. Hamilton,.....	Stev. Dig. 927, .....	672

Burnby v. Bollett,.....	16 M. & W. 644,.....	679
Burnell v. Hunt,.....	5 Jur. 650,.....	304
Burns v. City of Toronto,.....	42 U. C., Q. B., 560,.....	151, 373
Burton v. Eyre,.....	Cro. Jac. 288,.....	457
—— v. The Mayor and Corporation of Salford,.....	11 Q. B. D. 286,.....	313
Busby v. Winchester,.....	27 N. B. Rep. 231; 16 Can. S. C. R. 336,.....	408, 539

## C.

Calder v. Halket,.....	3 Moo. P. C. 28,.....	241
Callender v. Marsh,.....	1 Pick. 418,.....	4
Calverley v. Phelp,.....	6 Madd. 229,.....	358
Canada Atlantic Ry. Co. v. Moxley,.....	15 Can. S. C. R. 145,.....	648
Canada Southern Ry. Co. v. Phelps,.....	14 Can. S. C. R. 132,.....	648
Carpue v. London and Brighton Ry. Co.,.....	5 Q. B. 747,.....	610
Carter v. Saunders,.....	6 All. 147,.....	380, 672
Castor v. Corporation of Uxbridge,.....	39 U. C., Q. B., 113,.....	373
Cavillaud v. Yale,.....	2 U. S. Dig. 358,.....	623
Cayzer v. Taylor,.....	10 Gray 274,.....	427
Central Bank of Canada, <i>In re</i> ,.....	9 Can. L. Times 305; 17 Ont. R. 574,.....	359
Centre Wellington Case,.....	44 U. C., Q. B. 132,.....	166
Chamberlain v. King,.....	L. R. 6 C. P. 474,.....	327, 115
Chapman v. Chapman,.....	L. R. 9 Eq. 276,.....	623
Charman v. South-Eastern Ry. Co.,.....	21 Q. B. D. 524,.....	593
Citizens Insurance Company of Canada v. Parsons,.....	7 App. Cas. 96,.....	114
Clark v. Molyneux,.....	3 Q. B. D. 237,.....	440
Clarke v. Holmes,.....	7 H. & N. 937,.....	441
Clarke v. Town of Portland,.....	3 P. & B. 189,.....	373, 314, 256
Clayards v. Dethick,.....	12 Q. B. 439,.....	5
Clerk v. Robson,.....	1 H. Bl. 100,.....	166
Clifton v. Hooper,.....	6 Q. B. 468,.....	451
Cobequid Marine Ins. Co. v. Barteaux,.....	L. R. 6 P. C. 319,.....	524
Codrington v. Lloyd,.....	8 A. & E. 449,.....	586
Coe v. Wise,.....	L. R., 1 Q. B. 711,.....	247
Coggs v. Bernard,.....	2 Ld. Raym. 909,.....	540
Coles v. Jones,.....	2 Vern. 692,.....	358
Collins v. New York Central Ry. Co.,.....	12 N. T. Rep. 502,.....	661
Collis v. Seldon,.....	L. R. 3 C. P. 495,.....	5
Commercial Bank v. Wilson,.....	14 Grant 473,.....	636
Confederation Life Association of Canada v. O'Donnell,.....	10 Can. S. C. R. 92,.....	381
Cooper v. McDonald,.....	7 Ch. D. 288,.....	84
Corbet v. McCracken,.....	2 P. & B. 157,.....	576
Cotton v. Wood,.....	8 C. B. N. S. 568,.....	426, 5
Couch v. Steel,.....	3 E. & B. 402,.....	592

Court v. Jeffery, . . . . .	1 Sim & S. 105, . . . . .	358
Cracknell v. Corporation of Thetford, . . . . .	L. R. 4 C. P. 629, . . . . .	9
Craig v. Chisholm, . . . . .	1 P. & B. 218, . . . . .	645
Crease v. Barrett, . . . . .	1 C. M. & R. 919, . . . . .	379
Cromwell's Case, . . . . .	4 Rep. 126, . . . . .	671
Cullen v. Morris, . . . . .	2 Stark. 577, . . . . .	190
Currie, <i>Ex parte</i> , . . . . .	26 N. B. Rep. 403, . . . . .	167
Cushing v. Dupuy, . . . . .	5 App. Cas. 409, . . . . .	596

## D.

Daley, <i>Ex parte</i> , . . . . .	27 N. B. Rep. 129, . . . . .	545
Damer v. Busby, . . . . .	5 P. R. (Ont.) 356, . . . . .	532
Danaher, <i>Ex parte</i> , . . . . .	27 N. B. Rep. 554, . . . . .	113
Darby v. Cosens, . . . . .	1 T. R. 552, . . . . .	164
Davidson v. O'Connell, . . . . .	3 Pugs. 684, . . . . .	450
Dartnall v. Howard, . . . . .	4 B. & C. 345, . . . . .	623
De La Pole (Lady) v. Dick, . . . . .	29 Ch. D. 351, . . . . .	121
Dean v. Hornby, . . . . .	3 E. & B. 180, . . . . .	520
— v. Newhall, . . . . .	8 T. R. 168, . . . . .	415
DeRutzen v. Farr, . . . . .	4 A. & E. 53, . . . . .	379
Dewar v. Sparling, . . . . .	18 Grant 633, . . . . .	413
Dewey v. Bayntun, . . . . .	6 East 257, . . . . .	287
Doak v. Johnson, . . . . .	2 Kerr 319, . . . . .	463
<i>Doe dem.</i> Heathcote v. Hughes, . . . . .	2 P. & B. 296, . . . . .	25
— Morrough v. Maybee, . . . . .	2 U. C., Q. B. 389, . . . . .	26
— McVey v. Daniel, . . . . .	2 Pugs. 372, . . . . .	26
— Mudd v. Suckermore, . . . . .	5 A. & E. 703, . . . . .	481
— Parry v. James, . . . . .	16 East 212, . . . . .	287
— Smith v. Webber, . . . . .	4 N. & M. 746, 1 A. & E. 119, . . . . .	405
— Teynham v. Tyler, . . . . .	6 Bing 561, . . . . .	379
Doherty v. Mayor, etc., of Saint John, . . . . .	26 N. B. Rep. 618, . . . . .	5, 377
Donaldson v. Donaldson, . . . . .	Kay 711, . . . . .	360
Douglass v. Ward, . . . . .	11 Grant 39, . . . . .	636
Drummond v. Van Ingen, . . . . .	12 App. Cas. 284, . . . . .	679
Dublin, Wexford and Waterford Ry. Co. v. Slattery, . . . . .	3 App. Cas. 1155, . . . . .	655
Durgin v. Munson, . . . . .	9 Allen 396, . . . . .	426
Dwyer v. Town of Portland, . . . . .	4 P. & B. 423, . . . . .	256, 313, 373

## E.

Eastern Counties Ry. Co. v. Broom, . . . . .	6 Exch. 314, . . . . .	25, 231
Edwards v. Burgoyne, . . . . .	21 N. B. Rep. 228, . . . . .	662
— v. London and North Western Ry. Co., . . . . .	L. R. 5 C. P. 445, . . . . .	231
— v. Midland Ry. Co., . . . . .	6 Q. B. D. 287, . . . . .	242
Eland v. Karr, . . . . .	1 East 375, . . . . .	564
Eliza Cornish, The, . . . . .	17 Jur. 738, . . . . .	524
Ellis, <i>In re</i> , <i>Ex parte</i> Baird, . . . . .	27 N. B. Rep. 99, . . . . .	199, 204



Ellis v. Fleming,.....	1 C. P. D. 237,.....	165
— v. The Sheffield Gas Co.,.....	2 E. & B. 767,.....	658
Elmes v. Locke,.....	135 Mass. 575,.....	447
Elsee v. Gatward,.....	5 T. R. 143,.....	532
Emerson v. Brown,.....	7 M. & G. 476,.....	55

## F.

Farnworth v. Hyde,.....	18 C. B. N. S. 835,.....	517
Farrar v. Beswick,.....	1 M. & W. 682,.....	296
Farwell v. The Boston and Worcester Ry. Co.,.....	4 Metc. 49,.....	426
Fawtry v. Fawtry,.....	1 Salk. 36,.....	96
Feltham v. England,.....	L. R. 2 Q. B. 33,.....	426
Fennings v. Lord Grenville,.....	1 Taunt. 241,.....	296
Fergus v. Wardlaw,.....	3 Kerr 665,.....	584
Fettiplace v. Gorges,.....	1 Ves. 46,.....	77
Fish v. Howland,.....	1 Paige 20,.....	358
Fitchburg (Inhabitants of) v. Inhabitants of Winchendon,.....	4 Cush 190,.....	45
Fleckner v. Bank of the United States,...	8 Wheat. 338,.....	566
Forbes v. Ecclesiastical Commissioners for England,.....	L. R. 15 Eq. 51,.....	23
Ford v. Lacy,.....	7 H. & N. 151; 30 L. J. Exch. 351,.....	434
— v. Fitchburg Ry. Co.,.....	110 Mass. 240,.....	443
Fortre v. Fortre,.....	1 Show. 351,.....	74
Foster v. Dawber,.....	6 Exch. 839,.....	421
— v. Essex Bank,.....	17 Mass. 479,.....	540
Fox v. The Mayor, etc., of St. John,....	23 N. B. Rep. 244,.....	377
Foulkes v. Metropolitan District Ry. Co.,	5 C. P. D. 157,.....	532
Frankland v. Cole,.....	2 C. & J. 590,.....	622
Fray v. Blackburn,.....	3 B. & S. 576,.....	241
Frederickton (City) v. The Queen,.....	3 Can. S. C. R. 505,.....	613
Freeman v. Cooke,.....	2 Exch. 654,.....	282
— v. Pope,.....	L. R. 5 Ch. 538,.....	287
Fricke v. Poole,.....	9 B. & C. 543,.....	532

## G.

Gallagher, <i>Ex parte</i> ,.....	26 N. B. Rep. 73,.....	255
— v. Taylor,.....	5 Can. S. C. R. 368,.....	524
Garrick v. Lord Camden,.....	14 Ves. 372,.....	79
Gaters v. Madeley,.....	6 M. & W. 423,.....	93
Gerow v. The Royal Canadian Ass. Co.,...	27 N. B. Rep. 513,.....	516
Gibbs v. Mersey Docks Trustees,.....	L. R. 1 H. L. 93,.....	256
Gibson v. Mayor, etc., of Preston,.....	L. R. 5 Q. B. 218,.....	234, 601
Gilmor v. The Mayor of St. John,.....	28 N. B. Rep. 325,.....	377
Girvan v. Mayor, etc., of St. John,....	6 All. 411,.....	380
Glengarry Election Case,.....	14 Can. S. C. R. 453,.....	46

Geddis v. Proprietors of Bann Reservoir, . . . . .	3 App. Cas. 430, . . . . .	4
Godsall v. Boldero, . . . . .	9 East 72, . . . . .	520
Goff v. Great Northern Ry. Co., . . . . .	3 E. & E. 672, . . . . .	231
Gold Co., <i>In re</i> , . . . . .	12 Ch. D. 77, . . . . .	207
Goldsmith v. City of London, . . . . .	11 Ont. R. 26; 16 Can. S. C. R. 231, 151	
Good v. Merrithew, . . . . .	24 N. B. Rep. 160, . . . . .	117
Goodson v. Ellisson, . . . . .	3 Rus. 583, . . . . .	371
Goodtitle v. Badtitle, . . . . .	8 T. R. 638, . . . . .	450
Gould v. Dummett, . . . . .	12 Jur. N. S. 614, . . . . .	403
Gordon v. Hall, . . . . .	11 W. R. 281, . . . . .	121
Governor, etc., v. Meredith, . . . . .	4 T. B. 794, . . . . .	4
Graham v. Green, . . . . .	5 All. 330, . . . . .	568
—— v. Ingleby, . . . . .	1 Exch. 651, . . . . .	575
Grand Trunk Ry. Co. v. Cummings, . . . . .	106 U. S. 700, . . . . .	447
Grant v. Sir Charles Gould, . . . . .	2 H. Bl. 69, . . . . .	166
Great Western Ry. Co. v. Fawcett, . . . . .	9 Jur. N. S. 339; 1 Moo. P. C. N. S. 101, . . . . .	427
Gregory v. McQuade, . . . . .	3 Pugs. 1, . . . . .	122
Green v. Jackson, . . . . .	Peake's K. 311, . . . . .	625
—— v. The London General Omnibus Co., . . . . .	7 C. B. N. S. 288, . . . . .	234
—— v. The Mayor of St. John, . . . . .	1 Han. 531, . . . . .	645
—— v. Wynn, . . . . .	L. R. 7 Eq. 28, . . . . .	416
Griffin v. Weatherby, . . . . .	L. R. 3 Q. B. 753, . . . . .	369
Griffiths v. Gidlow, . . . . .	3 H. & N. 648, . . . . .	426
—— v. London and St. Katherine Docks Co., . . . . .	12 Q. B. D. 493, . . . . .	426
—— v. The Town of Portland, . . . . .	23 N. B. Rep. 559; 11 Can. S. C. R. 333, . . . . .	314, 373
Groves, <i>Ex parte</i> , . . . . .	23 N. B. Rep. 38, . . . . .	545

## H.

Hadden v. White, . . . . .	2 Kerr 634, . . . . .	34
Hall v. West, . . . . .	1 D. & L. 412, . . . . .	122
"Halley," The, . . . . .	L. R. 2 P. C. 193, . . . . .	652
Hallock v. Cambridge, . . . . .	9 Dowl. 583, . . . . .	166
Hammack v. White, . . . . .	11 C. B. N. S. 588, . . . . .	5
Hamilton v. Calder, . . . . .	23 N. B. Rep. 373, . . . . .	568
—— v. Mendes, . . . . .	2 Burr. 1198, . . . . .	520
Hammersmith, etc., Ry. Co. v. Brand, . . . . .	L. R. 4 H. L. 171, . . . . .	610
Hammond v. The Vestry of St. Pancras, . . . . .	L. R. 9 C. P. 316, . . . . .	592
Hanington v. Stewart, . . . . .	1 Pugs 242, . . . . .	122
Hankinson v. Bilby, . . . . .	16 M. & W. 442; 2 C. & K. 440, . . . . .	672
Hanson v. Parker, . . . . .	1 Wils. 257, . . . . .	452
Harman v. Tappenden, . . . . .	1 East 555, . . . . .	236
Harnett v. Wry, . . . . .	25 N. B. Rep. 258, . . . . .	122
Harper v. Godsell, . . . . .	L. R. 5 Q. B. 422, . . . . .	306
Harris v. Vail, . . . . .	1 P. & B. 587, . . . . .	296
Harrod v. Benton, . . . . .	8 B. & C. 217, . . . . .	636

Hart v. Brooklyn,	9 U. S. Dig. 447,	373
Hartnall v. Ryde Commissioners,	4 B. & S. 351,	374
Harvey v. N. Y. C. and H. R. R.,	88 N. Y. 481,	447
Heaven v. Pender,	11 Q. B. D. 503,	539
Helmores v. Smith,	35 Ch. D. 436,	301
Hemming v. Hale,	7 C. B., N. S. 487,	460
Hendricks v. Hallett,	1 Han. 170,	403
Hickson v. Loban,	24 N. B. Rep. 358,	636
—— v. Lombard,	L. R. 1 H. L. 324,	623
Hill v. City of Boston,	122 Mass. 344,	256, 314, 373
Hiort v. Bott,	L. R. 9 Exch. 86,	301
Hobart v. Abbot,	2 Pr. Wms. 643,	358
Hobson v. Thelluson,	L. R. 2 Q. B. 642,	459
Hodge v. The Queen,	9 App. Cas. 117,	114
Holden v. Liverpool New Gas and Coke Co.,	3 C. B. 1,	5
Holdsworth v. Wise,	7 B. & C. 794,	520
Hole v. The Sittingbourne Ry. Co.,	6 H. & N. 488,	645
Home v. Earl Camden,	4 T. R. 382; 2 H. Bl. 533,	166
Hoskins v. Matthews,	8 DeG., McN. & G. 13,	45
Hough v. Railway Co.,	100 Otto 213,	441
Howells v. Landore Steel Co.,	L. R. 10 Q. B. 62,	426
Hughes v. Sutherland,	1 Kerr 574,	587
Humphrey v. Bullen,	1 Atk. 458,	78
Hutchinson v. The York, Newcastle and Berwick Ry. Co.,	5 Exch. 343,	436
Hatton v. Eyre,	6 Taunt. 289,	415

## I.

Isaack v. Clark,	2 Bulst. 306, 312; 1 Roll, 59, 126,	540
------------------	-------------------------------------	-----

## J.

Jacklin v. Fytche,	14 M. & W. 381,	328
Jackson v. Beaumont,	11 Exch. 300,	168
—— v. O'Donnell,	2 Pugs. 60,	583
Jacobs v. Seward,	L. R. 5 H. L. 464,	296
James v. Dupres,	1 All. 506,	46
—— v. London and South Western Ry. Co.,	L. R. 7 Exch. 187,	169
—— v. San Francisco,	9 U. S. Dig. 446,	4
Jolliffe v. Wallasey Local Board,	L. R. 9 C. P. 62,	327
Jones, <i>Ex parte</i> ,	27 N. B. Rep. 552,	545
—— v. Calkin,	3 Pugs. 356,	361
—— v. Farrell,	1 DeG. & J. 208,	359

## K.

Keefe v. McLennan,	2 Russ. & Ches. 5,	114
Kemp v. Neville,	10 C. B., N. S. 523,	255

King v. Hoare,.....	13 M. & W. 494,.....	583
Kingston Election Case,.....	30 U. C., C. P. 389,.....	46
—————,.....	39 U. C., Q. B. 139,.....	46
Knight v. Faith,.....	15 Q. B. 649,.....	517

## L.

Lambert v. Hutchinson,.....	1 Beav. 277,.....	365
Lambert's Estate, <i>In re</i> ,.....	39 Ch. D. 626,.....	84
Lander v. Gordon,.....	7 M. & W. 218,.....	121
Landry v. Bank of Nova Scotia,.....	28 N. B. Rep. 491,.....	564
Lawless v. C. R. R.,.....	136 Mass. 1,.....	447
Lechmere v. Hawkins,.....	2 Esp. 626,.....	564
Leite v. Johnston,.....	L. R. 5 Eq. 266,.....	45
Lincoln College Case,.....	3 Rep. 58 <i>b</i> ,.....	109
Linford v. The Provincial Horse and Cat- tle Ins. Co.,.....	34 Beav. 291; 10 Jur. N. S. 1066,.....	506
Lister v. Perryman,.....	L. R. 4 H. L. 521,.....	463
London and Brighton Ry. Co. v. Truman,.....	11 App. Cas. 45,.....	4
London (Mayor of) v. Cox,.....	L. R. 2 H. L. 239,.....	169
Lord v. Colvin,.....	4 Drew. 396; 5 Jur. N. S. 351,.....	45
Lord v. Lee,.....	L. R. 3 Q. B. 404,.....	45
L'Union St. Jacques de Montreal v. Belisle,.....	L. R. 6 P. C. 31,.....	114
Lyell v. Kennedy,.....	9 App. Cas. 81,.....	479
Lynch v. Keegan,.....	3 Pugs. 645,.....	25

## M.

Mackay v. Commercial Bank of New Brunswick,.....	L. R. 5 P. C. 394,.....	242
Mackonochie v. Lord Penzance,.....	6 App. Cas. 424,.....	166
Macrae v. Clarke,.....	L. R. 1 C. P. 403,.....	460
Maddox v. Murphy,.....	27 N. B. Rep. 263,.....	380
Main v. Town of Saint Stephen,.....	26 N. B. Rep. 330,.....	30
Malin v. Malin,.....	2 Johns. 238,.....	358
Mangles v. Dixon,.....	3 H. L. Cas. 702,.....	358
Mansell v. The Queen,.....	8 E. & B. 54,.....	331
Mansfield v. Mansfield,.....	43 Ch. D. 12,.....	90
Maritime Bank v. McKean,.....	22 N. B. Rep. 526,.....	450
Martin v. Mackonochie,.....	3 Q. B. D. 730; 4 Q. B. D. 697,.....	182
———— v. Martin,.....	3 B. & Ad. 934,.....	636
Mather v. Brown,.....	1 C. P. D. 596,.....	169
Maude v. Lowley,.....	L. R. 9 C. P. 165,.....	46
Mayhew v. Herrick,.....	7 C. B. 229; 13 Jur. 1078,.....	296
Maynes v. Dolan,.....	3 All. 573,.....	380
Mechiam v. Horne,.....	20 Ont. R. 267,.....	137
Merivale v. Carson,.....	20 Q. B. D. 275,.....	674
Merner v. Klein,.....	17 U. C., C. P. 287,.....	25
Mersey Docks Co. v. Gibbs,.....	L. R. 1 H. L. 93; 11 H. L. Cas. 686,.....	247

Mill v. Hawker,.....	L. R. 9 Exch. 309 ; 10 Exch. 92,	25, 258, 315
Milne v. Gilbert, .....	2 DeG., McN. & G. 715; 5 Id. 510,.	82
—— v. Gilbert,.....	23 L. J. Eq. 828, 832 n,.....	85
Molony v. Kennedy, .....	10 Sim. 254,.....	98
Monks v. Jackson,.....	1 C. P. D. 683,.....	169
Montmagny Election Case,.....	15 Can. S. C. R. 1,.....	46, 170
Moore v. Moore,.....	25 Beav. 8,.....	452
Moorhouse v. Lord, .....	10 H. L. Cas. 272, ..	46
Morgan v. The Vale of Neath Ry. Co.,..	L. R. 1 Q. B. 149,.....	437
Morris v. Coles,.....	2 Dowl. 79,.....	44
—— v. Robinson, .....	3 B. & C. 196,.....	459
Morton v. Bartlett,.....	2 Pugs. 215,.....	27
Mostyn v. Fabrigas,.....	1 Sm. L. Cas. 652,.....	652
Muirhead v. Loban,.....	24 N. B. Rep. 350,.....	636
Mullin v. Frost,.....	4 P. & B. 112,.....	570
Murray v. Currie,.....	L. R. 6 C. P. 24,.....	652
Mutual Safety Ins. Co. v. Porter,.....	2 All. 230,.....	421

## Mc.

McAllister v. Bishop of Rochester,.....	5 C. P. D. 194,.....	46
McCallum v. Grand Trunk Ry. Co.,.....	30 U. C., Q. B. 122, 31 U. C., Q. B.	527,.....603, 610
McCatherine v. Lewis,.....	25 N. B. Rep. 429,.....	307
McCleave, <i>Ex parte</i> ,.....	21 N. B. Rep. 315,.....	169
McCourt v. McCarthy,.....	Stev. Dig. 1079,.....	491
McCulley, <i>Ex parte</i> ,.....	4 P. & B. 87,.....	121
McDonagh v. Jephson, <i>In re</i> ,.....	16 Ont. App. 107,.....	301
McGilvery v. Gault,.....	1 P. & B. 641,.....	25
McGown v. Yerks,.....	6 Johns. 450,.....	358
McIver v. Henderson,.....	4 M. & S. 576,.....	520
McKay v. Crocker,.....	5 All. 20,.....	299
McKenzie v. Scovil,.....	2 Han. 6,.....	672
McKinnon v. Penson,.....	9 Exch. 609,.....	233
McMahon v. Campbell,.....	2 U. C., Q. B. 158,.....	26
McMillan v. Fraser,.....	2 All. 615,.....	380
McNamee v. O'Brien,.....	4 All. 548,.....	582
McPherson v. Borough of Bathurst,.....	4 App. Cas. 256,.....	377
McSorley v. The Mayor, etc., of Saint John,.....	6 Can. S. C. R. 531,.....	25

## N.

National Mercantile Bank v. Hampson,..	5. Q. B. D. 177,.....	277
Newton v. Boodle, .....	4 C. B. 359,.....	403
—— v. Ellis, .....	5 E. & B. 115, .....	327
Nichols v. Marsland, .....	2 Exch. D. 1,.....	426
Nicholson v. Nowlin,.....	3 Pugs. 210,.....	532
Nitro-phosphate and Odam's Chemical Manure Co. v. London and St. Katharine Docks Co.,.....	9 Ch. D. 503,.....	426

Norris v. Smith, . . . . .	10 A. & E. 188, . . . . .	328
Norrish v. Marshall, . . . . .	5 Madd. 475, . . . . .	358
Nugent v. Smith, . . . . .	1 C. P. D. 423, . . . . .	426
Nutter v. Acerington Local Board of Health, . . . . .	4 Q. B. D. 375, . . . . .	5

## O.

O'Connor v. Pittsburg, . . . . .	9 U. S. Dig. 477, . . . . .	4
Ognell's Case, . . . . .	4 Coke 48 b, . . . . .	89
O'Leary v. Graham, . . . . .	5 All. 105, . . . . .	44
Oliver v. Worcester, . . . . .	102 Mass. 489, . . . . .	25
Ormod v. Huth, . . . . .	14 M. & W. 651, . . . . .	679
O'Regan v. Berrymount, . . . . .	1 Kerr 167, . . . . .	44
Ormond v. Holland, . . . . .	E. B. & E. 102, . . . . .	426
Osborn v. Fallows, . . . . .	1 Russ. & M. 741, . . . . .	358

## P.

Palk v. Clinton, . . . . .	12 Ves. 48, . . . . .	358
Palmer v. Grand Junction Ry. Co., . . . . .	4 M. & W. 749, . . . . .	610
—— v. Wilbur, . . . . .	3 All. 443, . . . . .	463
Panton v. Williams, . . . . .	2 Q. B. 169, . . . . .	463
Park Gate Iron Co. v. Coates, . . . . .	L. R. 5 C. P. 534, . . . . .	574
Parnaby v. Lancaster Canal Co., . . . . .	11 A. & E. 223, . . . . .	256
Parrott v. Roberts, . . . . .	2 P. & B. 388, . . . . .	46
Parsons v. St. Mathew's Vestry, . . . . .	L. R. 3 C. P. 56, . . . . .	234
Partington v. The Attorney-General, . . . . .	L. R. 4 H. L. 100, . . . . .	667
Paton v. Currie, . . . . .	19 U. C. Q. B. 388, . . . . .	25
Pattison v. Mayor, etc., of Saint John, . . . . .	2 P. & B. 636; Cas. Dig. 96, . . . . .	151
Pease v. C. & N. Ry. Co., . . . . .	61 Wisc. 163, . . . . .	447
People v. Adsit, . . . . .	2 Hill 619, . . . . .	314
Perley v. Dibblee, . . . . .	1 Kerr 514, . . . . .	315
Philadelphia, Wilmington & Baltimore R. R. Co. v. Quigley, . . . . .	21 How. 202, . . . . .	251
Phillips v. Ensell, . . . . .	1 C. M. & R. 374, . . . . .	44
—— v. Eyre, . . . . .	L. R. 4 Q. B. 25, . . . . .	652
Phipps v. Lovegrove, . . . . .	L. R. 16 Eq. 80, . . . . .	360
Pickard v. Sears, . . . . .	6 A. & E. 469, . . . . .	282
Polak v. Everett, . . . . .	1 Q. B. D. 669, . . . . .	282
Poulin v. Corporation of Quebec, . . . . .	9 Can. S. C. R. 185, . . . . .	114
Poulsum v. Thirst, . . . . .	L. R. 2 C. P. 449, . . . . .	327
Poulton v. London and South Western Ry. Co., . . . . .	L. R. 2 Q. B. 534, . . . . .	231
Pourier, <i>Ex parte</i> , . . . . .	23 N. B. Rep. 544, . . . . .	135
Pourrier v. Raymond, . . . . .	1 Han. 520, . . . . .	92
Priestley v. Fowler, . . . . .	3 M. & W. 1, . . . . .	426
Prince v. Samo, . . . . .	7 A. & E. 627, . . . . .	463
Pringle v. Crooks, . . . . .	3 Y. & Coll. 666, . . . . .	366
Prole v. Soady, . . . . .	L. R. 3 Ch. 220, . . . . .	93

Proudley v. Fielder,.....	2 Myl. & K. 57,.....	98
Provincial Ins. Co. v. Leduc,.....	L. R. 6 P. C. 224,.....	523
Providence Washington Ins. Co. v. Corbett,.....	9 Can. S. C. R. 256,.....	520
Purcell v. Kennedy,.....	14 Can. S. C. R. 453,.....	46
Purves v. Landell,.....	12 Cl. & F. 91,.....	623
Putnam v. Johnson,.....	10 Mass. 488,.....	45

## Q.

Quimbo Appo, v. People, .....	20 N. Y. 531, .....	169
-------------------------------	---------------------	-----

## R.

Ranger v. Great Western Ry. Co.,....	5 H. L. Cas. 72, .....	242
Rankin v. Potter,.....	L. R. 6 H. L. 83, .....	520
Ravenga v. Mackintosh, ....	2 B. & C. 693,.....	463
Read v. Smith,.....	Bert. R. 173, .....	568
Record v. Record,.....	21 N. B. Rep. 277, .....	636
Reedie v. London & Northwestern Ry. Co.,	4 Exch. 244, .....	652
Redfield v. The Corporation of Wickham,	13 App. Cas. 467,.....	595
Reg. v. Bertrand, .....	L. R. 1 P. C. 520,.....	46
— v. Champneys, .....	L. R. 6 C. P. 384,.....	499
— v. Dean of Rochester,.....	17 Q. B. 1, .....	548
— v. Dibblee, .....	23 N. B. Rep. 30,.....	549
— v. Doyle, .....	12 Ont. R. 347,.....	135
— v. Farrant, .....	20 Q. B. D. 58,.....	544
— v. Ferris, .....	18 Ont. R. 476,.....	133
— v. Good,.....	17 Ont. R. 725,.....	134
— v. Grimmer, .....	25 N. B. Rep. 424,.....	544
— v. Handsley,.....	8 Q. B. D. 383,.....	544
— v. Harris,.....	1 Ld. Raym. 267, .....	546
— v. Harshman,.....	1 Pugs. 317,.....	134
— v. High Halden,.....	1 F. & F. 678,.....	394
— v. Johnson, .....	8 Q. B. 102,.....	138
— v. Justices of Kings,.....	2 Pugs. 535,.....	113
— v. Ledgard, .....	1 Q. B. 616; 8 A. & E. 535,.....	190
— v. Lee, .....	9 Q. B. D. 394,.....	544
— v. Marsh, .....	25 N. B. Rep. 370,.....	450
— v. Menary,.....	19 Ont. R. 691,.....	133, 145
— v. Meyer,.....	1 Q. B. D. 173,.....	544
— v. Milledge, .....	4 Q. B. D. 332,.....	544
— v. Oakes,.....	21 N. S. Rep. 481,.....	133
— v. Owens, .....	2 E. & E. 86, .....	190
— v. Perley, .....	25 N. B. Rep. 43,.....	133
— v. Perrin, .....	16 Ont. R. 446,.....	269
— v. Price, .....	L. R. 6 Q. B. 411,.....	170
— v. Prudhomme, .....	7 Can. L. T. 211,.....	166
— v. Rand, .....	L. R. 1 Q. B. 230,.....	544
— v. Salter, .....	20 N. S. Rep 206,.....	134



<b>Reg.</b> v. Shehan,.....	29 N. B. Rep. 133,.....	145
— v. Simmons,.....	1 Pugs. 158,.....	549
— v. Sir Travers Twiss,.....	L. R. 4 Q. B. 407,.....	166
— v. Sullivan,.....	24 N. B. Rep. 149,.....	133
— v. The Justices of Huntingdon,.....	4 Q. B. D. 522,.....	544
— v. The Local Government Board,.....	10 Q. B. D. 309,.....	166
— v. The Mayor of Bangor,.....	18 Q. B. D. 349 ; 13 App. Cas. 241,.....	167
— v. White,.....	28 N. B. Rep. 216,.....	143
<b>Reid</b> v. Reid,.....	31 Ch. D. 402,.....	90
<b>Rex</b> v. Bettesworth,.....	2 Stra. 1111,.....	77
— v. Leake,.....	5 B. & Ad. 469,.....	394
<b>Rhodes</b> v. Innes,.....	7 Bing. 329,.....	44
<b>Rider</b> v. Wood,.....	2 E. & E. 338,.....	5
<b>Ringland</b> v. City of Toronto,.....	23 U. C. C. P. 93,.....	153
<b>Roberts</b> v. Chicago,.....	9 U. S. Dig. 419,.....	4
<b>Robertson</b> v. Armstrong,.....	23 N. B. Rep. 102,.....	560
— v. Clarke,.....	1 Bing. 445,.....	524
— v. Laurie,.....	14 Can. S. C. R. 258,.....	44
<b>Robinson</b> v. The New Brunswick Ry. Co.,.....	11 Can. S. C. R. 688,.....	648
<b>Robson</b> v. North Eastern Railway Co.,.....	2 Q. B. D. 85,.....	593
<b>Roe</b> v. Birkenhead, etc., Ry. Co.,.....	7 Exch. 36,.....	231
<b>Rogers</b> v. Peck,.....	Bert. R. 318,.....	26
— v. Turner,.....	26 N. B. Rep. 164,.....	563
— v. Wallace,.....	24 N. B. Rep. 459,.....	45
<b>Rounds</b> v. Town of Stratford,.....	26 U. C. C. P. 11,.....	373
<b>Roux</b> v. Salvador,.....	3 Bing. N. C. 266,.....	517
<b>Ruel</b> v. Temple,.....	26 N. B. Rep. 569,.....	45

## S.

<b>Sand's Case</b> (Sir George),.....	3 Salk. 22,.....	77
<b>Scott</b> v. Henley,.....	1 M. & R. 227,.....	459
<b>Searle</b> , v. Lindsay,.....	11 C. B. N. S. 429,.....	426
<b>Secord</b> v. Green,.....	1 All. 41,.....	636
<b>Seery</b> v. Brayley,.....	3 All. 315,.....	31
<b>Selmes</b> v. Judge,.....	L. R. 6 Q. B. 724,.....	115, 327
<b>Senior</b> v. Ward,.....	1 E. & E. 385,.....	426
<b>Seymour</b> v. Maddox,.....	16 Q. B. 326,.....	623
<b>Shapcott</b> v. Chappell,.....	12 Q. B. D. 58,.....	381
<b>Sheffield</b> v. Sheffield,.....	L. R. 10 Ch. 206,.....	45
<b>Sheldon</b> v. Baker,.....	1 T. R. 87,.....	532
<b>Shepherd</b> v. Henderson,.....	7 App. Cas. 49,.....	520
<b>Sherrington</b> v. Yates,.....	12 M. & W. 855,.....	93
<b>Silkstone</b> and <b>Dodworth Coal and Iron Co., In re. Whitworth's Case</b> ,.....	19 Ch. D. 118,.....	208
<b>Simmons</b> v. City of Camden,.....	7 Am. Rep. 620,.....	4
<b>Slavin</b> and the Corporation of Orilia, <i>In re</i> ,.....	36 U. C. Q. B. 159,.....	114
<b>Smeeton</b> v. Collier,.....	1 Exch. 457,.....	167
<b>Smith</b> v. Corporation of Washington,.....	20 How. 135,.....	8
— v. Dedham,.....	8 Cush. 522,.....	5

Smith v. Dowell, .....	3 F. & F. 238, .....	426
—— v. Great Eastern Ry. Co., .....	L. R. 2 C. P. 41, .....	5
—— v. Mayor of London, .....	6 Mod. 78, .....	166
—— v. White, .....	2 P. & B. 443, .....	296
Smith & Co. v. West Derby Local Board, .....	3 C. P. D. 423, .....	322
Smyth, <i>Ex parte</i> , .....	2 C., M. & R. 748, .....	165
—— <i>Ex parte</i> , .....	3 A. & E. 719, .....	166
South Renfrew Case [2], .....	11 Can. L. J. N. S. 48, .....	169
Southampton and Itchin Bridge Co. v. Southampton Board of Health, .....	8 E. & B. 801, .....	234
Spirett v. Willows, .....	3 DeG., J. & S., 293, .....	287
Stanton v. Lambert, .....	39 Ch. D. 626, .....	86
Stephenson v. Elliott, .....	3 Pugs. 199, .....	532
Stevens v. Midland Counties Ry. Co., .....	10 Exch. 352, .....	242
Stewart v. Snowball, .....	3 P. & B. 59, .....	381
Stimson v. Farnham, .....	L. R. 7 Q. B. 175, .....	459
Stobart v. Dryden, .....	1 M. & W. 615, .....	463
Stockdale v. Hansard, .....	9 A. & E. 1, .....	171
Stocks v. Dobson, .....	4 DeG., M. & G. 11, .....	358
Sutton's Hospital Case, .....	10 Co. Rep. 1 a, .....	234

## T.

Taaffe v. Downes, .....	3 Moo. P. C. 36, .....	255
Tarrant v. Webb, .....	18 C. B. 797, .....	426
Tate v. Citizens' Mutual Fire Ins. Co., .....	13 Gray 79, .....	506
Taylor v. City of Yonkers, .....	59 Am. Rep. 492, .....	151
—— v. Milner, .....	10 Ves. 444, .....	492
—— v. Nesfield, .....	4 E. & B. 462, .....	411
—— v. Okey, .....	13 Ves. 180, .....	564
—— v. Smith, .....	1 Han. 120, .....	519
Thayer v. City of Boston, .....	19 Pick. 511, .....	25
Theberge v. Laundry, .....	2 App. Cas. 102, .....	197
Thelluson v. Fletcher, .....	1 Esp. 73, .....	525
Thompson v. Bernard, .....	1 Camp. 48, .....	671
Thorne v. Deas, .....	4 Johns (N. Y.) 84, .....	532
Thorpe v. Adams, .....	L. R. 6 C. P. 125, .....	499
Three Rivers (Corporation of) v. Sulte, .....	5 Legal News 330, .....	114
Tichener, <i>In re</i> , .....	35 Beav. 317, .....	358
Tindall, <i>Ex parte</i> , .....	6 DeG., McN. & G. 741, .....	59
Tomlins v. Lawrence, .....	6 Bing. 376, .....	421
Tommey v. White, .....	3 H. L. Cas. 49, .....	121
Town of Portland v. Griffiths, .....	11 Can. S. C. R. 333, .....	5
Townsend v. Burns, .....	2 C. & J. 468, .....	532
Tozer v. Child, .....	7 E. & B. 377; 26 L. J. Q. B. 151, .....	236
Turton v. Benson, .....	2 Vern. 764, .....	358
Twyne's Case, .....	1 Sm. L. Cas. 1, .....	287

## U.

Udny v. Udny,.....	L. R. 1 Sc. App. 441,.....	46
Union Steamship Company of New Zealand and v. Melbourne Harbour Trust Commissioners,.....	9 App. Cas. 365,.....	323

## V.

Vacher v. Cocks,.....	M. & M. 353,.....	452
Valin v. Langlois,.....	3 Can. S. C. R. 1,.....	613
Vallance v. Falle,.....	13 Q. B. D. 109,.....	592
Vassie v. Vassie,.....	22 N. B. Rep. 76,.....	283
Vaughan v. Taff Vale Ry. Co.,.....	3 H. & N. 742; 5 H. & N. 679,.....	647
Venning v. Steadman,.....	9 Can. S. C. R. 206,.....	115
Vye v. Alexander,.....	28 N. B. Rep. 89; 16 Can. S. C. R. 501,.....	469

## W.

Wakelin v. London and South Western Railway Co.,.....	12 App. Cas. 41,.....	5, 651
Walcot v. Botfield,.....	18 Jur. 570,.....	44
Walker v. City of Halifax,.....	4 Rus. & Gel. 371,.....	619
—— v. Rostron,.....	9 M. & W. 411,.....	369
—— v. South Eastern Ry. Co.,.....	L. R. 5. C. P. 640,.....	247
Wallace, <i>Ex parte</i> ,.....	27 N. B. Rep. 174,.....	559
—— v. Small,.....	M. & M. 446,.....	279
Warner v. Suckerman,.....	3 Bulst. 119,.....	182
Watt v. Watt,.....	3 Ves. 244,.....	74
Weaver v. Clifford,.....	Cro. Jac. 3,.....	457
Welfare v. London and Brighton Rail- way Co.,.....	L. R. 4 Q. B. 693,.....	5
Wetmore v. McKenzie,.....	1 P. & B. 557,.....	532
Wheeler v. Gibbs,.....	3 Can. S. C. R. 374,.....	45
White, <i>Ex parte</i> ,.....	4 P. & B. 552,.....	132
Whitehouse v. Fellowes,.....	10 C. B., N. S. 765,.....	4
Whitfield v. South Eastern Ry. Co.,.....	E. B. & E. 115,.....	242
Whitworth's Case; <i>Re</i> Silkstone and Dod- worth Coal and Iron Co.,.....	19 Ch. D. 118,.....	208
Wiggins v. White,.....	Bert. R. 97,.....	296
Wigmore v. Jay,.....	5 Exch. 354,.....	444
Williams v. Bayley,.....	L. R. 1 H. L. 200,.....	463
—— v. City of Portland,.....	29 N. B. Rep. 1,.....	331
—— v. Mostyn,.....	4 M. & W. 145,.....	451
—— v. Piggott,.....	1 M. & W. 574,.....	44
—— v. Wilcox,.....	8 A. & E. 314,.....	382
Withers v. North Kent Ry. Co.,.....	27 L. J. Exch. 417,.....	426
Wilson v. Drake,.....	2 Mod. 20,.....	80
—— v. Mayor, etc., of Halifax,.....	L. R. 3 Exch. 114,.....	234, 327

Wood v. Emerson,.....	26 N. B. Rep. 532,.....	45
——v. Williams,.....	4 Madd. 186, .....	358
Woodman v. Town of Moncton,.....	4 P. & B. 12,.....	570
Worthington v. Jeffries, .....	L. R. 10 C. P. 379,.....	165
Wright v. <i>Doe dem.</i> Tatham, .....	7 A. & E. 313,.....	379
——v. Parlee,.....	3 Pugs. 381,.....	575

## X.

Xenos v. Wickham,.....	L. R. 2 H. L. 296,.....	506
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## Y.

Yarborough v. Bank of England,.....	16 East 6,.....	243
Yelverton v. Yelverton,.....	1 Swa. & Tr. 574; 29 L. J. Mat. 34, .	44
Young v. Davis,.....	7 H. & N. 760; 2 H. & C. 197,...	233
——v. Woodcock,.....	3 Kerr 554,.....	583



# CASES DETERMINED BY THE SUPREME COURT OF NEW BRUNSWICK.

WILLIAMS AND WIFE v. THE CITY OF PORTLAND.

1889.

*City of Portland—Power to alter and amend streets—Right to cut down and change grade—Negligence.* October 10.

The Act 34 Vic., c. 11, incorporating the City of Portland, gave the City Council the control and management of the streets, with power "to open, lay out, regulate, repair, amend and clean the same."

The plaintiff's house fronted on one of the streets of the city, standing a few feet back from the line of the street, which at that place was lower than the land on which the house stood, and was reached by steps from the front of house. The Corporation, in altering the level of the street, cut it down some feet lower than it had been, and in doing so, took away the steps leading up to the plaintiff's house;—the overseer of the work stating that they would be replaced. The plaintiff then, in order to get access to and from the street, placed planks from the front of his house to the street below, on an incline of about 30 degrees. In going from the house to the street upon these planks, the plaintiff's wife slipped and was injured.

*Held*—in an action against the city for the injury to the wife—(PALMER, J., dissenting), that the corporation was not liable, the alteration in the level of the street being authorized by the Act of incorporation, and the work not having been done negligently.

This was an action for damages for injuries sustained by the female plaintiff by reason of the alleged negligence of the defendants; tried before His Honor Mr. Justice Wetmore, at the Saint John Circuit, in August, 1888.

The declaration contained two counts. The first alleged that the defendants had, previous to and at the time of the committing of the grievances thereafter mentioned, the care, management, and control of a certain street and public highway in the said City of Portland, called Bridge street; that the said plaintiff, Edward Williams, was possessed of a dwelling house and premises fronting upon the said street and highway, and the said plaintiffs had the right to pass and

1889.  
WILLIAMS  
v.  
THE CITY OF  
PORTLAND.

repass to and from their said dwelling house, and to and from the said street and highway; that the said dwelling house and the said land of the said plaintiff, Edward Williams, was some distance above the said street and highway, or that portion of it upon which the public usually travelled, and in order to facilitate egress and regress to the said plaintiffs from their said dwelling house and premises to and from the said street and highway, there were, and had been for a long time, wooden steps, leading from said dwelling house and premises to the said street and highway, which steps were then, and had been for a long time prior to the grievances thereafter mentioned, rightfully and lawfully there; that the defendants, their contractors, servants, workmen, and agents, cut down the said street and highway in front of the said dwelling house and property so as to make the said street and highway considerably lower than it had previously been, and did also wrongfully, illegally, and improperly take away the said steps so as to make it dangerous getting from the said dwelling house and upon the said street and highway; that the said defendants frequently promised to replace said steps, and to continue the same down to the said street and highway as so lowered, but did not do so, and wrongfully, illegally, and improperly left the said approach to said street from said dwelling house and premises, in a dangerous condition for a long space of time, which dangerous condition thereof was caused by the acts of the said defendants, their servants, agents, and workmen as aforesaid; that the said plaintiff, Edward Williams, relying upon the said promise, in order to get access to said street, and as a temporary means of getting such access was obliged to, and did prudently, carefully, and in a reasonable manner, place boards leading in a slanting direction from the said premises to the said highway as a temporary means of getting from said dwelling house upon said highway until the said defendants should place said steps there, as they had agreed and were lawfully bound to do; the said plaintiff, Edward Williams, using all proper and reasonable care in that behalf. That the said Alice S. Williams, then being the wife of the said Edward Williams, while seeking to pass from said dwelling house to said street by the way which she had been



theretofore accustomed to, and had a right to go, was stepping down the said boards, when, without any fault of her own, she slipped and fell, and was very severely bruised, wounded, maimed, and injured, and became and was sick and disabled for a long time, and suffered great pain of body and mind.

1889.  
WILLIAMS  
v.  
THE CITY OF  
PORTLAND.

The second count was for damages for the loss by the plaintiff, Edward Williams, of the services of the female plaintiff. The plaintiffs claimed, under the first count, \$2,000, and the plaintiff, Edward Williams claimed under the second count \$500.

The defendants pleaded, 1st. Not guilty. 2nd. That the defendants did the several acts complained of by authority of the Act 34 Vic., cap. 11, incorporating the Town of Portland, and Acts in amendment thereof, and without negligence. 3rd and 4th. That they did not promise or agree, and were not bound to replace or continue the steps as alleged. 5th. That the steps were upon and wrongfully encumbering the street, and the defendants, as they lawfully might, removed them.

At the close of the plaintiffs' case, a motion was made for a nonsuit, which was refused, leave being reserved to the defendants to move to enter a nonsuit.

The learned Judge submitted several questions to the jury, which, with the answers, were as follows:

1. Was the street cut down in front of the plaintiff's premises, and the plaintiff's means of access to the street from his premises cut off thereby? Yes.

2. Was it reasonably necessary for the plaintiff in order to get from his premises to the street, to put the planks in the position they were placed? Yes.

3. Could not the plaintiffs reasonably have had access to the highway by some other way than by these planks? No.

4. Would it not have been more prudent for the plaintiff to have used such other mode of access, rather than these planks? No.

5. Could not the injury sustained have been avoided by the plaintiff using reasonable prudence in selecting the means of access at present used? No.

6. Was not the injury sustained by the female plaintiff the

1889. result of imprudently using the planks instead of using the place now used? No.

WILLIAMS  
v.  
THE CITY OF  
PORTLAND.

7. What do the jury assess the damages to the female plaintiff at? \$500.

8. What do the jury assess the damages to the husband plaintiff at? \$100.

9. What damages did the plaintiff sustain, if any, by reason of the cutting down of the street? \$20.

10. What damage did the plaintiff sustain by removing the steps? \$5.

11. Was the cutting the street done under the authority of the defendants under Dunlop, the road supervisor, he acting on behalf of the City of Portland, for the public benefit and convenience? Yes.

12. Could not the injury sustained have been avoided by putting pieces across the planks? Might or might not.

13. Was there any negligence on the part of the surveyor in cutting down the street? Yes.

A verdict was entered for the plaintiffs accordingly.

June 19, 1889. *L. A. Currey* moved for a non-suit pursuant to leave reserved, or, failing that, for a new trial. The defendants are empowered by the Act 34 Vic. cap. 11, sec. 83, to alter and amend the streets of the city. The word "amend" is broad enough in meaning to authorize the cutting down of the street complained of, and no action will lie for the damages to the plaintiffs' land by reason of the defendants' acts unless they did the work in a negligent and improper manner, which is not alleged. *Pattison v. Mayor, etc., of Saint John* (1); *O'Connor v. Pittsburg* (2); *Roberts v. Chicago* (3); *James v. San Francisco* (4); *London and Brighton R'y Co. v. Truman* (5); *Geddis v. Proprietors of Bann Reservoir* (6); *Governor, etc., v. Meredith* (7); *Whitehouse v. Fellowes* (8); *Callender v. Marsh* (9); *Simmons v. City of Camden* (10). There was evidence of contributory negligence in placing and using the planks as the plaintiffs did. The cutting down of the street was not the proximate cause of the

(1) 2 P. & B. 636; Cas. Dig. 96.

(2) 9 U. S. Dig. 477.

(3) Id. 419.

(4) Id. 446.

(5) 11 App. Cas. 46.

(6) 3 App. Cas. 480.

(7) 4 T. R. 794.

(8) 10 C. B. N. S. 765.

(9) 1 Pick. 418.

(10) 7 Am. Rep. 630.

injury. *Wakelin v. London and South Western R'y Co.* (1); 1889.  
*Rider v. Wood* (2); *Holden v. Liverpool New Gas and Coke* WILLIAMS  
*Co.* (3); *Town of Portland v. Griffiths* (4); *Collis v. Seldon* v.  
 (5); *Cotton v. Wood* (6); *Hammack v. White* (7); *Smith v. THE CITY OF*  
*Great Eastern R'y Co.* (8); *Welfare v. London, Brighton and PORTLAND.*  
*South Coast R'y Co.* (9); *Smith v. Dedham* (10); *Assop v.*  
*Yates* (11); *Adams v. Lancashire and Yorkshire R'y Co.* (12).

*W. Pugsley, S. G., contra.* The Act of incorporation does not give the defendants the right to alter the level of the street merely for the public convenience, if the result is to interfere with the plaintiffs' means of access to the street, and to injure their property. *Nutter v. Accrington Local Board of Health* (13), per Bramwell and Brett, L. JJ. But the defendants, even if they were authorized to cut down the streets, wrongfully encroached upon the plaintiffs' property and removed their steps, which they clearly had no right to do. As to the defendants' liability, the plaintiff having placed the planks where they were when the injury happened, it must be borne in mind that the defendants had completely cut off the plaintiffs' means of access to the street, and in order to get to the street and to their outbuildings on the other side, it was necessary to use some temporary contrivance such as they did use. And the jury have found that it was reasonably necessary for the plaintiffs in order to get from their premises to the street, to put the planks in the position in which they were placed, and that the female plaintiff could not reasonably have had access to the highway by any other way than using the planks. Under these findings the plaintiffs are entitled to recover. See *Clayards v. Dethick* (14); *Doherty v. Mayor, etc., of Saint John* (15). If the plaintiffs, having been wrongfully and illegally deprived by the defendants of their means of access to the street, would be justified, as they clearly would under the authorities, in incurring some risk in endeavoring to get from their house to the highway, and in doing which, in a prudent and careful manner, if they sustained an injury, an

(1) 12 App. Cas. 41.

(2) 2 E. &amp; E. 333.

(3) 3 C. B. 1.

(4) 11 Can. S. C. R. 333.

(5) L. R. 3 C. P. 495.

(6) 8 C. B. N. S. 568.

(7) 11 C. B. N. S. 594.

(8) L. R. 2 C. P. 41.

(9) L. R. 4 Q. B. 693.

(10) 8 Cush. 522.

(11) 2 H. &amp; N. 768.

(12) L. R. 4 C. P. 739.

(13) 4 Q. B. D. 381.

(14) 12 Q. B. 439.

(15) 26 N. R. Rep. 613.

1889.  
 WILLIAMS  
 v.  
 THE CITY OF  
 PORTLAND.  
 Tuck, J

public. And it was further held, that the power of altering amending and repairing the streets is restricted by no condition, save only the implied condition, that what shall be done in the name of the public, and ostensibly for their benefit and convenience, shall not be done in such a manner as in reality to constitute a public nuisance.

In 1878, the late Mr. Justice Weldon granted an order of injunction to restrain the Corporation of Saint John from cutting down Union street and George street. This injunction was afterwards dissolved, chiefly on the ground of delay in making the application. Subsequently actions at law were taken against the City of Saint John, and McGuiggan and McGourty, by Messrs. Yeats, to recover damages for injuries which they had suffered from the cutting down of those streets. When the decision in *Pattison v. The Mayor of Saint John* was given, Mr. Weldon, the plaintiffs' attorney and counsel, virtually abandoned the suits by allowing verdicts to be entered for the defendants when the causes were taken down to trial by proviso.

The same principle is recognized by the Supreme Court of the United States. In *Smith v. Corporation of Washington* (1), it is held that the power to open and keep in repair streets and alleys, given to a city, includes the power to establish a grade and to change it when established, and that for the exercise of this power, when carefully and skilfully done, no right of action accrues to proprietors of adjoining property by reason of this change of the grade of the streets. To the same effect are the decisions in *Simmons v. The City of Camden* (2), and *Callender v. Marsh* (3). Then there is a class of cases which decide, that where a company or corporation has done nothing but that which the Act authorized, and if the damage arising therefrom is not owing to any negligence on the part of the corporation in the mode of executing or carrying into effect the powers given by the Act, then the person who is injuriously affected by that which has been done, is deprived of compensation unless it is given by the Act itself, because there has been nothing done which is inconsistent with the powers conferred by the Act, and with the proper execution

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(1) 20 How. 135.

(2) 7 Am. Rep. 620.

(3) 1 Pick. 418.

of those powers. Of such cases are *Governor, etc. v. Meredith* (1), and *Cracknell v. The Corporation of Thetford* (2). In construing a railway Act, Lord Halsbury, in delivering judgments in the *London & Brighton Railway Co. v. Truman* (3), says: "It cannot now be doubted that a railway company constituted for the purpose of carrying passengers or goods or cattle, are protected in the use of the functions with which Parliament has entrusted them, if the use they make of those functions necessarily involves the creation of what would otherwise be a nuisance at common law." I refer to this case for the purpose of showing how far the House of Lords has gone in protecting railway companies for acts done by them in pursuance of Acts of Parliament. The principle affirmed in this case, is, that there is no cause of action for doing that which is authorized by the statute, provided there is no negligence in the manner of doing what is authorized.

1889.

WILLIAMS  
v.  
THE CITY OF  
PORTLAND.  
TUCK, J.

It is not charged here that the defendants did the work which they were authorized to do by the statute, carelessly and negligently, whereby the plaintiffs suffered damage, and there is no evidence to that effect. But the declaration charges that these acts of the defendants in reducing the level of the street in front of the plaintiffs' dwelling house, and in taking away the plaintiffs' steps, were done wrongfully, illegally, and improperly: that is, the defendants had no right nor power to cut down the street, nor take away the steps. I think the defendants are authorized by Act of Assembly to cut down the street, and if the steps are encumbering it, to remove them.

In framing the declaration, the pleader seeks apparently to get rid of the effect of decisions in *Pattison v. The Mayor of St. John*, and like cases, by alleging a promise by defendants to replace the steps, and continue them down to the street and highway as levelled. Thus we have an extraordinary count in the declaration, being partly in tort and partly in contract. It is not necessary to decide here whether or not such a declaration is demurrable. But even if the declaration is good, the plaintiffs cannot recover upon such a contract as is there stated. There is no good consideration for it, and no authority

(1) 4 T. R. 794.

(2) L. R. 4 C. P. 629.

(3) 11 App. Cas. 50.

1889. to make the promise which the female plaintiff says James  
 WILLIAMS Dunlop did make. Dunlop was supervisor of roads in Port-  
 v. land, under whose direction Bridge street was cut down. Mrs.  
 THE CITY OF WILLIAMS in her evidence speaks of a conversation she had  
 PORTLAND. with Dunlop after the steps had been removed. She says: "I  
 Tuck, J. asked him, did he intend to replace the steps, as he took them  
 away. He said he would see that the Town replaced the steps.  
 Then he took a tape line from his pocket and measured for  
 the steps, saying he should see them replaced. He guaranteed  
 they would be all right; he said it would be all right, and took  
 the measurement." The steps were not replaced. Now, if  
 this is true, it furnishes no cause of action against the defend-  
 ants. The promise was without consideration, and James  
 Dunlop had no authority to bind the Corporation. He was  
 supervisor of roads, and his duties were, as he says in his evi-  
 dence, under instructions from the aldermen of each ward, to  
 go on with any work in connection with repairs and improve-  
 ments of sidewalks and streets. It was no part of his duty,  
 nor was it within the scope of his authority to bind the Cor-  
 poration by a promise to replace steps which had been removed.  
 The plaintiffs fail completely in this part of the declaration.

But it is said by plaintiffs' counsel that he is not driven to  
 dispute the right of the City to lower the level of the streets;  
 that it is not necessary for the plaintiffs' case. He contends  
 that in the cutting the defendants went beyond the line of the  
 street, and cut away the plaintiffs' steps, which were on his  
 land. I fail to find any evidence which goes to show that the  
 steps were on Williams' land. None of the witnesses say so.  
 Dunlop's evidence is to the effect that the cutting was all  
 within the lines of the street. Edward Williams showed no  
 title to the soil of Bridge street. His evidence is that he had  
 possession of the dwelling house on land fronting on Bridge  
 street, and as is said by Duff, J., in giving his judgment in  
*Pattison v. The Mayor of Saint John*, it is not necessarily to  
 be inferred that because a man's land is bounded by a street  
 or highway, therefore his title to the soil extends *ad medium*  
*filum viæ*. It is always a question of intention. There is no  
 presumption that the plaintiff was owner of the soil. Besides,  
 the *gravamen* of the case is not a trespass on the plaintiffs'

property. The declaration does not meet a case of cutting away the plaintiffs' land and thereby removing his steps. On the contrary, the allegation is that the defendants cut down the street so as to make it considerably lower than it had previously been, and did also wrongfully, illegally and improperly take away the steps, so as to make it dangerous getting from the dwelling house to and upon the street.

But apart altogether from the right of the defendants to lower the level of the street, I think the fact that the plaintiffs placed the planks where they did, and the manner in which they were placed, prevent them from recovering in this action. It is true that the jury found for the plaintiffs upon this point, in answer to a question put to them by the learned Judge, but in my opinion there was no evidence to warrant their finding. Edward Williams, in giving evidence, says that he placed two small planks in a slanting direction from the roadway to his platform; one was ten feet six inches, and the other nine feet six inches, in length; that his wife in going from the house to the street over these planks, when they were slippery, fell and was injured. He says also, that he put these planks there because he had to do so, as he had no other means of getting from his house to the roadway. And further, he says that it was dangerous to go up and down these planks, and he knew that it would be dangerous to walk on them when he placed them there. It seems clear that the want of proper care and caution in the use of planks placed there by the plaintiff, Edward Williams, caused the accident to his wife. Suppose it was necessary that planks should be placed where they were to enable the plaintiffs to get from the house to the street. Then they ought to have been placed in such a way as to make it reasonably safe to pass over them. Instead of doing this, the plaintiff himself says that he placed them in such a position that it was dangerous to pass over them. Not only was there no reasonable prudence shown by the plaintiffs, but they were really guilty of gross carelessness, without which the injury to Mrs. Williams would not have occurred. The plaintiffs did what a prudent person would not have done under the circumstances. Had it not been for their negligence

1889.  
WILLIAMS  
v.  
THE CITY OF  
PORTLAND.  
Tuck, J.  
—

1889. and want of ordinary care and caution, the misfortune would not have happened.

WILLIAMS  
v.  
THE CITY OF  
PORTLAND.

In my opinion, on both grounds, the rule must be absolute to enter a non-suit.

Tuck, J.

KING, J. This is an action for damages sustained by the female plaintiff in attempting to get from her house to the street, to which it is alleged the defendants improperly made the access difficult by cutting down the street and removing steps, and for damages sustained by the male plaintiff through the consequent loss of his wife's services, etc. The street was one called Bridge street, leading from Main street to Spar Cove, and thence to Millidgeville road. Prior to the cutting down of the street, access to the street from the house of plaintiffs was had by a few steps leading to an embankment, which again was a few feet above the level of the travelled portion of the road. The cutting which was done, reduced the level of the embankment and of the travelled portion to a uniform level, three feet below the former level of the travelled portion. The effect of this was to leave the plaintiffs' house, or rather a small platform or verandah in front of the house, six feet above the level of the street, with no mode of access directly in front of it. The plaintiff placed a couple of deals from the platform to the street level, and it was in walking down this that the female plaintiff fell and sustained injuries. Amongst other things, it was contended for defendants that it was an imprudent act on the part of the female plaintiff to attempt to go down the planks without any cleats being upon them to prevent slipping, and especially as a less dangerous way of getting down could have been had by going along the platform to a part where the bank and the street level came nearer together. This was left to the jury, who found for the plaintiffs upon this question.

The defendants also contended that there was no proof that the street was cut down by them. By sec. 58 of 34 Vic., cap. 11, the Town Council is empowered to appoint a supervisor of roads, and sec. 88 defines the supervisor's duties to be "under direction of the Town Council or any committee thereof, to superintend the work on the roads, byeways, streets,



sidewalks, etc., within the said Town, and from time to time to report to the chairman of the Town Council, etc., all encumbrances thereon and all places requiring amendment and repair thereon," etc.

1889.  


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 WILLIAMS  
 v.  
 THE CITY OF  
 PORTLAND.  


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 King, J.  


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Mr. Goddard, the clerk, says that appropriations for the streets are made and a certain amount is appropriated for each ward, and that amount is spent by the supervisor. There is a record of the appropriation but no record of how it is spent. The whole Council is the Committee, and the aldermen of each ward are supposed to supervise the expenditure of the money in each ward; and the money is spent by the supervisor under their supervision.

Mr. Dunlop, who was supervisor from 1879 to 1888, says he performed his duties under the instruction of the aldermen of each ward, and from them took his instructions and went on with the work. "I went on with any work they told me to, year after year, in connection with repairs and improvements of sidewalks and streets. That as supervisor he had done a little most every year on the Bridge Road. We would work a small portion every year, and it is two years since we got to Williams'. McKeever, the contractor, cut the road down. The work was supposed to be done under my supervision. \* \* \* The work was supervised under the direction of Mr. Daniel Purdy and Alderman McGoldrick, the latter being one of the aldermen for ward 5. He (Ald. McGoldrick) was there once or twice a day while the work was going on. Previous to this cutting, work had been done on both ends of the road on both sides of Mr. Williams'. Those expenditures have been made by me as Supervisor of Roads for the City of Portland, by the order of the aldermen of the 5th Ward."

On cross-examination: "This was an outside matter, outside of the ward money. This was contract work, outside of the appropriation. I had nothing to do with this, except to see it was done right. When I said I was under the instructions of the aldermen of each ward and went on with the work, I mean the work of which I took account at the time myself. That would not refer to any special work or outside contracts. I worked pretty well one year to Williams', and next year

1889. started on the bridge at Indiantown and laid a platform to  
Mrs. Bryce's."

WILLIAMS  
v.  
THE CITY OF  
PORTLAND.  
King, J.

He describes what was done: "We cut it down two and a half or three feet. The steps were up off the ground before that. We started at nothing at one end, and cut three feet off the hill and put it in the hollow below. \* \* \* There was a little roll on the road. We cut this so as to make it all flat. We took the steps away, and cut three feet under the steps right down through. We made the whole thing level."

I think this is some evidence that the work was done by the Town. The Town Council have the sole and exclusive management and control of all roads, bye-roads, highways, streets, sidewalks, etc., within the said Town, and power to open, lay out, regulate, repair, amend and clean, etc. Section 83.

When we find extensive cutting down on a street, cutting down and filling up—and find one of the aldermen of the ward there once or twice a day while the work was going on, and find the supervisor of roads supervising it to see that it was done right, I think it is a fair inference that the Town Council were doing the work, because no one else had a right to do it, and their officers are present directing and supervising.

On the evidence, it would be a violent presumption to conclude that unauthorized persons were committing such a nuisance as would be implied in their unauthorized cutting down of the road.

I do not think it necessary for plaintiffs to have produced the contract with McKeever.

Another contention is, that the street being under 50 feet in width, viz., 30 feet, it is not a public street, and no money could be expended on it. If the action had been for non-repair, the objection that the City was not empowered to repair it would be pertinent (that is, supposing it is well founded), but it is no answer to an action for in fact doing improper work upon it. If no money had been spent, there would have been no cause of action. But as to the section relating to the width of the road: sec. 85 of 34 Vic., cap. 11, declares that "The Town Council shall make a record of all the streets within the Town which are of the full width of 50 feet, and

upon which any of the inhabitants actually reside, upon application of any two or more of such inhabitants resident thereon, in order that all Her Majesty's subjects in the said Town may have the benefit of the work done to improve the roads and streets in the said town."

38 Vic., cap. 92, declares "that no street within the Town of Portland shall hereafter be recorded, nor shall any of the moneys of the said Town be expended in work thereon, unless the same shall be at least of the full width of fifty feet, and the same shall in the opinion of the Town Council be in good passable condition for foot passengers and vehicles."

The 85th sec. of the Incorporation Act does not seem to make it an absolute duty to record, but requires the Town Council to record streets "upon application of any two or more of the inhabitants resident thereon." This does not have the effect of depriving the public of any right in any street; or, in other words, of depriving the street of its character as such because not recorded; but the evident and declared object of it is to enable the persons living on the road to have the road treated as such in improvements. And by the General Highway Act of 1862, which is to be applicable to Portland, so far as not inconsistent with the Incorporation Act, all roads not recorded, upon which public money has been expended, are thereby declared public roads or highways, although less than four rods wide.

As to the Act 38 Vic., cap. 92, the condition attached to the recording that the street shall in the opinion of the Council be in a good passable condition for foot passengers and vehicles, seems to me to show that it is directed against the recording of streets which were, if I may so say, sought to be dedicated for public uses, and turned from private ways to public streets.

To say that a public street shall not be adopted as a public street unless it is first in a good passable condition for foot passengers and vehicles, would be to prevent the Town Council from themselves laying out and making a new street, for it could not be in good passable condition for foot passengers and vehicles before it was a street or way at all. The evident purpose was to prevent private land owners from putting off upon the Town narrow ways laid off over their property.

1889.

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 WILLIAMS  
 v.  
 THE CITY OF  
 PORTLAND.

---

 King, J.  


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1889.  
 WILLIAMS  
 v.  
 THE CITY OF  
 PORTLAND.  
 King, J.

It was also contended that there was no proof of Bridge street being a public street. But I think that its public use, and the fact that a street running there was shewn in a plan in the proper custody, laid off as long as 1839, is sufficient evidence of this. But really, it seems to me, that defendants stand to lose more than they can gain by the success of such contention; for if it is not a public street, but a private way, it would be impossible for defendants to justify their cutting it down.

Next it was contended that the cutting down of the street is not actionable, inasmuch as it is authorized by the legislature, unless it was wantonly and arbitrarily done, or done in a negligent manner. As to negligence in the matter, the jury have indeed found it, but the evidence wholly fails to establish it. Indeed, I cannot perceive that the *Solicitor General* addressed to us any argument in support of the finding.

Then as to the right of the defendants to alter the level of the streets by cutting down and filling up, the defendants are empowered by sec. 83 of their Incorporation Act, 34 Vic., cap. 11, to lay out, open, amend, and repair the roads, streets, etc., in Portland, and the question is whether this extends to the alteration of the level of the streets and roads, at all events to an extent that may interfere with the access of adjoining property owners. In support of the power, Mr. Currey, for the defendants, cited amongst other cases *Pattison v. The Mayor of St. John* (1); *Smith v. City of Washington* (2); *Simmons v. City of Camden* (3); *Callender v. Marsh* (4). In *Pattison v. The Mayor of St. John*, the summary in the Digest gives a brief synopsis of the judgment of Mr. Justice Gwynne, in which Mr. Justice Taschereau concurred—and states that Justices Henry and Fournier dissented. Nothing is said as to what other judges took part. His Lordship Mr. Justice Gwynne's opinion as stated was, that the Corporation of St. John have, under the several Acts of Parliament which confirm and amend the charter, complete legislative power to raise or lower the level of the streets to any extent that the irregularities of the ground may seem to the Corporation and its Council, as repre-

(1) Cassel's Dig. 96.  
 (2) 20 How. 135.

(3) 7 Am. Rep. 620.  
 (4) 1 Pick. 418.

senting the public, to require for the benefit and convenience of the public, and that the powers conferred on them must have a liberal construction, in view of the public rather than private interests; or, as he again expresses it, the power of altering, amending, repairing and improving the streets, which is a power vested in the Corporation for the benefit of the public, is restricted by no condition save only by the implied condition that what shall be done in the name of the public and ostensibly for their benefit and convenience shall not be done in such a manner as in reality to constitute a public nuisance. (What makes that case particularly noteworthy is the fact that defendants had amongst other things erected a fence in the street a few feet distant from plaintiff's house and running lengthwise of the street for a considerable distance.)

The learned counsel for plaintiff, Mr. *Pugsley*, drew attention to the fact mentioned in the report of the case, that an Act, 9 Geo. 4, c. 4, had referred to the cutting down of streets in St. John by the Corporation as a legitimate exercise of authority. The Act in question recited, that whereas, in consequence of the irregularities of the ground upon which the City of St. John is laid out, it has been found expedient to make various and extensive alterations in the level of the streets, which had rendered it necessary, in many instances, for the proprietors of houses fronting on such streets to erect steps and stairways, etc., etc.; and whereas doubts have arisen as to whether the said Corporation is empowered by charter or law to permit erection of such steps or stairways, and it is expedient that said Corporation should be allowed to exercise such power under certain limits. The Act then grants such power to permit the erection of steps.

Perhaps the most that can be said of this Act as bearing on the question before us is, that it impliedly recognizes the right to cut down the streets. The Legislature does not interpret the law, and perhaps the Act is not very important as bearing upon the power in the case of St. John. At least the judgment, so far as reported, does not seem to put this forward as very material. In the case of the charter of St. John, the power granted was to alter, amend, and repair streets. The words of the Portland Incorporation Act are at least as full.

1889.

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WILLIAMS  
v.  
THE CITY OF  
PORTLAND.  

---

King, J.  

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1889.  
 WILLIAMS  
 v.  
 THE CITY OF  
 PORTLAND.  
 King, J.

In *Smith v. City of Washington* (1), the Supreme Court of the United States dealt with the matter. It was there said: "The power to open and keep in repair streets, etc., given to a city, includes the power to establish a grade and to change it when established. For the exercise of this power, when carefully and skillfully done, no right of action accrues to proprietors of adjoining property by reason of this change of grade of the streets. Streets cannot be opened and kept in repair, or made safe or convenient for the public use without being made level, or as nearly so as the nature of the ground will permit. Hills must be cut down and hollows filled up, or, in other words, the road must be graded. Nor could the allegation be admitted, that having once fixed a grade, which is now found improper and insufficient, the corporation has exhausted its power and has no authority to change the level or grade in order to keep the street in repair. As the duty is a continuing one, so is the power necessary to perform it. Having performed this trust confided to them by law according to the best of their judgment and discretion, without exceeding the jurisdiction and authority vested in them as agents of the public, and on land dedicated to public use for the purpose of a highway, they have not acted unlawfully or wrongly as charged in the declaration."

The Court then referred to the decisions to like effect of several State Courts, and amongst others to *Callender v. Marsh* (2), where the defendant, as surveyor of highways, was charged with digging down a street in Boston so as to endanger the foundations of plaintiff's house. The Statute required that all highways, etc., should be kept in repair, and amended, from time to time, that the same may be safe and convenient for travel. "This very general and exclusive authority" says the Court of Massachusetts, "would seem to include everything which may be needed towards making the ways perfect and complete, either by levelling them where uneven and difficult of ascent and descent, or raising them where they should be sunken or miry."

It seems to me that these decisions are well adapted to the state of things existing in a new and large country where pro-

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(1) 20 How. 135.

(2) 1 Pick. 418.

1889.

WILLIAMS

v.  
THE CITY OF  
PORTLAND.

King, J.

gress is made in a tentative fashion, and where it can hardly be expected that roads shall be made right in the first instance. The *Solicitor General* referred us to remarks made by Bramwell and Brett, L. JJ., in argument in *Nutter v. Accrington Local Board of Health* (1), and if those remarks were made in reference to the power of defendants under an Act authorizing them "to cause all streets to be levelled, paved, flagged, channelled, altered, and repaired as occasion may require," as would at first sight appear, the observations would be very strong. But on looking closely at the argument, it seems to me that the observations are directed to another Statute that was cited, where power was given to maintain, etc., roads. And on this Bramwell, L. J., asks: "What power had the trustees to raise the road?" And Brett, L. J., says: "Maintenance must mean keeping it up as it is. Could they level a hilly road?"

Upon the whole, therefore, I think that the City of Portland was authorized by the Legislature to alter the level of this road as they have done. I would only add that in a territory as large as that embraced in the City of Portland, their powers in this respect would be much restricted if they could not alter levels as claimed.

Upon the argument it was contended for plaintiff that the cutting extended beyond the line of the street. It seems to me that the evidence shews that the cutting was within direct side lines from the side lines further on each way; but apart from this, there was, as I understand, no count for trespass. An amendment adding a count for trespass was proposed at the trial, but was withdrawn, and it seems to me that the plaintiffs' case ultimately rested upon the allegation that the defendants had improperly interfered with a highway.

The defendants made another answer, namely, that if it was not a public street the act of cutting was *ultra vires*, and the town was not liable. I say nothing as to this.

In one count there was an appearance of an intention to set up a contract to erect steps, but this is stated by the *Solicitor General* not to have been intended, and is not put forward as a cause of action. I think, therefore, that the defendants are entitled to have non suit entered in accordance with leave reserved.

1889.

WILLIAMS  
v.  
THE CITY OF  
PORTLAND.  
Palmer, J.

PALMER, J. This was an action tried before Mr. Justice Wetmore, at the Saint John Circuit, in August, 1888. The material facts relating to the matter in controversy are, that the male plaintiff was the owner and occupier of a dwelling house and lot on the west side of Bridge street, in the City of Portland, which house stood several feet back from the street, and had a platform in front with a railing around it, with one opening in the front, opposite the front door, from which there were wooden steps to the said street, which was a few feet from and below the platform. These steps were the only mode of ingress and egress between the house and the street, and it had been so used by the plaintiffs for about five years, from the time he first moved upon the premises. The plaintiffs had hens on the other side of the street, which were attended to by the female plaintiff, who had to cross the street for that purpose several times a day. The plaintiff in his evidence stated that there was no other way by which the house could be entered, except by these steps. On the 11th June, 1887, the road authorities of the City cut down the street in front of the house, and in doing so cut up to the platform, thus removing the plaintiffs' steps, and left the premises so that it was a perpendicular fall of about six feet from the new cut street below to the edge of the platform above. The workmen who did this promised to put in new steps. The male plaintiff, in order to get in and out of his house, placed two deals about ten feet long side by side, slanting from the platform to the street, which would be at the end of the planks about five feet below the platform, as a means of ingress and egress, thus making an angle of depression of about thirty-three degrees. The steps were not put in as promised, and matters remained in this state until the 22nd June, when the female plaintiff, in going over these planks in order to pass over the street to feed the fowl, fell and was injured, and this is the cause of action.

There is no doubt of the City's connection with this act of cutting down the street under the evidence, but the question is, whether having done this shows any liability for the consequences. The evidence of the male plaintiff shows these facts. The jury assessed the damages to the female plaintiff at \$500, to the male plaintiff at \$100 for the injury to his wife, \$20 for



cutting down the street and \$5 for taking away the steps. There was no laying out of the street proved, and consequently its true boundaries were not defined, and it was not shewn where the west boundary was, further than as it was used as a highway, which, of necessity, could not have extended further west than the plaintiffs' steps. It follows that the City shewed no right to extend the street westerly to the platform, and as the plaintiff was in possession, this shewed a title as against all persons not shewing a better. It follows that the City was shewn to be a wrongdoer and a trespasser in so extending the street westward and taking away plaintiffs' steps; but I do not see how damages for these acts could be recovered in an action by the husband and wife. The wife had no interest in either of them. This leaves the question whether making and leaving the passage from plaintiffs' house to the street in the dangerous state it was in, which was one of the causes of the injury to the female plaintiff, makes the defendants liable therefor, as they wrongfully changed such passage so as to make it impossible to pass to and from the plaintiffs' house without passing over a perpendicular fall of about six feet, and so left it. This would appear to be a great outrage, for the damage resulting from which the law would clearly make them liable. The only question that remains is: whether this was the proximate cause of the injury. It clearly was, unless the putting of the planks there by the male plaintiff or the attempting to pass over them by the female plaintiff, was an act shewing a want of ordinary prudence in doing it. If it was, in either of them, I think they cannot recover. The question whether they are guilty or not of such negligence is a question of degree. If, when the female plaintiff passed over, the danger was so great that no sensible person would have undertaken it, then the plaintiff ought not to recover. I cannot say that this was so obviously dangerous that she could not with prudence make the attempt to pass over these planks. The evidence shews that both plaintiffs had passed safely over them many times for eleven days. Another consideration is, that these plaintiffs were not bound to remain imprisoned in their dwelling house nor to leave their fowls to die for want of being attended to, and a prudent person might be induced to

1889.

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WILLIAMS  
v.  
THE CITY OF  
PORTLAND.

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Palmer, J.

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1889. run more risk in such a case than in cases under circumstances less pressing. All these are proper considerations for the jury. So, with regard to the placing of the planks, if the doing so made the place more dangerous than the defendants left it, then it might be said that the accident was caused by the putting of the planks there; but if the planks lessened the danger, or rather, that the plaintiff finding a dangerous place to pass and looking about for the means of lessening the danger as much as possible, he prudently put the planks there, then the doing so was not the cause of the accident, but was an act of prudence in attempting to pass a dangerous place, and therefore no contributory negligence. The real cause of the damage was the wrong act of the defendants. This was a question for the jury which was properly left to them and their finding was entirely justified by the evidence. This view is entirely borne out by the case of *Clayards v. Dethick* (1). If it had not been shewn that the defendants' act was wrongful in cutting the street into the plaintiffs' land, this case would have raised a question of very great importance to property holders in the City of Portland. That is: whether the City could cut down or raise the level of a street in front of a person's land and house having an entrance from the street, so as to cut off such entrance or otherwise injuriously affect the property or house without compensation. The only power the City has to do this is contained in the 83rd section of chap. 11 of 34 Vic., which is as follows: "The Town Council shall have the sole and exclusive management and control of all roads, byeroads, highways, streets, sidewalks, wharves, docks, slips, ways, lanes and alleys, within the said Town, and power to open, lay out, regulate, repair, amend, and clean the same, and to put and build drains, culverts and bridges therein, and shall control the expenditure of all Legislative grants for byeroads within the said Town, and all moneys assessed and collected or expended from the general revenues of the said Town, for and on account of the making, repairing, and improvement of any such roads, byeroads, highways, streets, sidewalks, wharves, docks, slips, ways, lanes and alleys: provided that nothing herein contained shall extend or be

construed to extend to authorize the opening of any street, road, or highway, through the private property of any person or persons without complying with the provisions of any Act of Assembly providing for compensation therefor, etc.”

1889.  
WILLIAMS  
v.  
THE CITY OF  
PORTLAND.  
Palmer, J.

No doubt whether this section gives the power is a question of construction; but in view that a fair meaning can be given to all the words of the Act, by allowing the City to lay out, regulate, and repair, mend and clean the streets when the doing so would not interfere with the rights of property, or after having acquired the right necessary to do so, it would be doing violence to every principle of construction to say that the Legislature intended to interfere with such rights, or to take away or injure another's property, whether it was to take away their right of way or the right of light or air. It would be unjust to do this, and no statute ought to be construed to do that if any other reasonable meaning can be given to the words used. *Forbes v. Ecclesiastical Commissioners for England* (1) was decided on this principle. The Court there say, “to hold otherwise would destroy by a side-wind private rights, which never could have been in the contemplation of the Legislature.” The statute on which Lord Penzance expressed his opinion in *Nutter v. Accrington Local Board of Health* (2), contained express words authorising them to level the streets. My view is that the statute does not give them such power, and the only way they can exercise the power given to them where private rights intervene to prevent it, is by acquiring all the property and rights necessary to use or destroy in such exercise.

I think the verdict should be entered for \$600 for the plaintiffs.

WETMORE and FRASER. JJ., agreed that a non-suit should be entered.

Sir JOHN C. ALLEN, C. J., not having heard the argument, took no part.

*Non-suit granted.\**

(1) L. R. 15 Eq. 61.

(2) 4 Q. B. D. 375.

\* Affirmed on appeal by the Supreme Court of Canada.

1889.

## FANJOY v. THE CITY OF PORTLAND.

October 10.

*False imprisonment—Arrest for taxes already paid—Notice of assessment—Liability of Corporation for illegal arrest on execution issued by its officer—Respondeat superior—Execution to levy on goods, or, in default, imprisonment—Arrest without searching for goods—Excessive damages—New trial.*

Plaintiff (W. T. F.) having received a notice addressed to W. F., of assessment for taxes against him in the City of Portland, under the Act 48 Vic., c. 46, paid the amount to the Chamberlain of the City, who gave a receipt for the payment and credited it to W. F. in the Assessment Book. It afterwards appearing that the assessment against the plaintiff was unpaid, the Receiver of Taxes issued an execution against him for the amount, by which a constable was directed to levy on the plaintiff's goods and chattels, and in default of goods, to imprison him. The constable informed the plaintiff that he had the execution, and applied to him for payment, whereupon the plaintiff said that he had paid the taxes and had a receipt but had mislaid it, and it was never produced to the constable, who some months afterwards arrested the plaintiff and he then paid the taxes and was released. Having afterwards found the receipt, the plaintiff brought an action for false imprisonment against the City, and obtained a verdict for \$400 damages.

*Held—(WETMORE, J., dubitante)* 1. That even if the taxes paid by the plaintiff were not the taxes against himself, but the taxes of W. F., his arrest was wrongful for the following reasons:—(a). Because the execution directed the constable to arrest the plaintiff only in case of the want of goods and chattels whereon to levy the amount, and there was no evidence of want of goods and chattels; and (b) Because it was proved that the plaintiff had paid the identical taxes for the non-payment of which the execution issued.

2. That the execution having been issued by the Receiver of Taxes of the City, and delivered by him to the constable, the City—having received the amount of the taxes paid by the plaintiff to obtain his discharge from arrest—was liable for the wrongful arrest.

3. That the damages were excessive, and that a new trial should be granted unless the plaintiff consented to reduce them to \$100. Per WETMORE, J., that the action should have been brought in the County Court.

Remarks of TUCK, J., on the case of *McSorley v. Mayor of St. John*, 6 Can. S. C. R. 531.

This was an action for false imprisonment, brought by William T. Fanjoy against the City of Portland. The pleas were: Not guilty; and a justification of the arrest by virtue of execution issued under 48 Vic., cap. 46, sec. 28, for taxes assessed against the plaintiff.

The material facts, as they appeared at the trial, which took place before His Honor Mr. Justice Fraser, at the Saint John Circuit, in November, 1888, are sufficiently given in the judgments. Verdict for plaintiff for \$400.

June 26, 1889. *L. A. Currey*, on behalf of the defendants, moved for a new trial. The jury should have been directed

that the Chamberlain, who issued the execution, was appointed by virtue of a statute; that his duties were entirely statutory, and were defined by law; and that the defendants were not liable for his acts. If no taxes were due, the act of the Chamberlain in issuing the execution would be *ultra vires*, and the defendants would not be liable for any arrest made under it. [*Blair, A. G.*, contra. It is submitted that this objection, and the grounds of misdirection given in the notice of motion, are not open to the defendants, as they were not raised on the trial. The case was tried out on their plea of justification under the execution, and the ground was not taken that the defendants were not responsible for the acts of the Chamberlain and the constable. See *Lynch v. Keegan* (1); *Doe dem. Heathcote v. Hughes* (2)]. See *Paton v. Currie* (3), and *Merner v. Klein* (4), as to what grounds are available on motion for a new trial. Admitting all the facts proved on the trial, it is claimed that under the statute the plaintiff cannot recover. [TUCK, J. You will have some difficulty in getting over the case of *McSorley v. The Mayor, etc., of Saint John* (5).] In that case, there was evidence of ratification by the corporation of the acts of the Chamberlain. The statute declares who shall issue the execution for taxes, and the City Council, by directing him to proceed as the law directs, does not make the City liable if he issues an execution against a person who has paid the amount assessed against him. Neither are the defendants liable for the neglect of the constable in not looking for goods and chattels before making the arrest, and the learned Judge should have so charged. It was misdirection in telling the jury that the onus was upon the defendants, in order to justify the arrest, to show that the plaintiff had no goods and chattels. The Chamberlain and constable are not the agents or servants of the City so as to make the City liable for their acts. *McGilvery v. Gault* (6); *Mill v. Hawker* (7); *Dillon Mun. Corp.* 890; *Wood on Master and Servant*, sec. 468; *Thayer v. City of Boston* (8); *Oliver v. Worcester* (9); *Eastern Counties Ry. Co. v. Broom* (10).

1889.

FANJOY  
v.  
THE CITY OF  
PORTLAND.

(1) 3 Puga. 645.  
(2) 2 P. & B. 296.  
(3) 19 U. C., Q. B. 338.  
(4) 17 U. C., C. P. 287.  
(5) 6 Can. & C. R. 531.

(6) 1 P. & B. 641.  
(7) L. R. 9 Exch. 309.  
(8) 19 Pick. 511.  
(9) 102 Mass. 499.  
(10) 6 Exch. 314.

1889.  
FANJOY  
v.  
THE CITY OF  
PORTLAND.

It is also submitted that under the circumstances proved, the damages are excessive, and shew that the jury acted arbitrarily.

*Blair, A. G., and A. H. Hanington, contra.* The case was tried out on the ground that the constable was justified under the execution in making the arrest; which is entirely inconsistent with the contention now made that the City is not liable for his acts, or for the acts of the Chamberlain. This ground was not taken on the trial, and is therefore not available here. See *Hill N. T.*, (2 ed) 40-41; *McMahon v. Campbell* (1); *Doe dem. Morrough v. Maybee* (2); *Rogers v. Peck* (3); *Doe dem. Mc Vey v. Daniel* (4); *Brown v. Bristol R'y Co.* (5).

But assuming that the question as to the liability of the City for the acts of its officers is open to the defendants, the maxim *respondet superior* applies. When the Chamberlain gave the constable the execution, he was acting within the scope of his employment as the defendants' officer; and it was the constable's duty to execute it. The fact that the officer acted improperly in the execution of his duty, does not relieve the defendants from liability for his acts. See *Bayley v. Manchester, Sheffield and Lincolnshire R'y Co* (6). The manner of executing the process is incidental to the performance of his duty, and within the officer's discretion. *Dillon Mun. Corp.* sec. 772. But even if the officers were not acting within the scope of their authority, the council of the City has ratified their acts by accepting and retaining the money paid by the plaintiff. If the wrong notice was sent to the plaintiff, then the execution could not legally issue, as notice must be served ten days before an execution can properly issue. As to the damages: The constable acted in an unnecessarily harsh manner. He might have called at the plaintiff's residence, in Portland, but instead of that he went to a store in which the plaintiff was employed in the City of Saint John and there publicly arrested him. The jury, in assessing the damages, considered the feelings of the plaintiff. The mere fact that the damages are high, and more than the court would have given,

(1) 2 U. C., Q. B. 158.  
(2) 2 U. C., Q. B. 389.  
(3) *Bert. R.* 318.

(4) 2 *Puga*. 372.  
(5) 7 *H. & N.* 1006.  
(6) *L. R. 8 C. P.* 148.

is not sufficient ground for disturbing the verdict: *Morton v. Bartlett* (1); *Brewing v. Berryman* (2). 1889.

FANJOY  
v.  
THE CITY OF  
PORTLAND.

*Currey*, in reply.

*Cur. adv. vult.*

The following judgments were now delivered:

TUCK, J. This was an action for false imprisonment. The defendants pleaded not guilty, and gave notice of justification, to the effect that the plaintiff was properly arrested on an execution issued for assessed taxes in the City of Portland for 1885.

In August, 1885, a tax bill, amounting to \$2.25, with a notice appended, addressed to "Mr. William Fanjoy," and signed "W. A. Moore, Chamberlain and Receiver of Taxes," was left at the plaintiff's residence in Portland. The plaintiff, in his evidence, stated that shortly after he received the bill he took it to the Chamberlain's office, paid the amount, less the usual discount of five per cent., and got a receipt. Some time in the spring of 1886, Howard, a constable, met the plaintiff in the street, and said that he had a tax bill against him, and did the same on two other occasions. On each occasion plaintiff told the constable that he had paid the taxes, and had a receipt, but could not find it. He made search afterwards and found the receipt, and carried it around in his pocket to show Howard, but did not see him. In November, 1887, the constable arrested the plaintiff at the store of C. & E. Everett, Saint John, in whose employ he was. The constable went with the plaintiff, at his request, to his house in Paradise row, when, being unable at the time to find the receipt, he paid the amount of execution and costs, \$2.85, in Spragg's store, and was discharged. Afterwards this receipt was found, and was produced at the trial.

In his charge to the jury, the learned Judge put the case in two ways. First, he said, assuming that the taxes paid were those of William Fanjoy, an uncle of the plaintiff, and not those of the plaintiff himself, yet the plaintiff is entitled to recover, because, under the law, the execution which the Re-

1889.  
FANJOY  
v.  
THE CITY OF  
PORTLAND.  
Tuck, J.

ceiver of Taxes for the City of Portland is authorized to issue states that the constable, for want of goods and chattels, lands and tenements whereon to levy, should take William Fanjoy and deliver him to the keeper of the gaol of the City and County of Saint John. And there is not a shadow of evidence to show that there were not goods and chattels on which this amount could have been levied; nor is there evidence of a request by the constable to point out any; therefore it must be clear that it was outside the warrant of law, even if Fanjoy owed the taxes, to arrest him, and on that point he is entitled to recover.

Then, on the second branch, the learned Judge said he had a clear opinion, that the plaintiff having sworn that he paid the Chamberlain the very taxes for which he had been arrested, and this statement being uncontradicted, he was entitled to recover. In the course of the charge, the jury were told that the credibility of a witness was entirely a matter for them, but they were bound to give a reasonable credence to the plaintiff, in view of the want of contradiction. The charge is in effect a direction to find for the plaintiff and assess the damages.

The defendants object to the charge on both its branches. They say that the Chamberlain and Receiver of Taxes of the City of Portland was a statutory officer, who should perform only the duty imposed upon him by statute, and that if he issued an execution for taxes which caused the arrest of a person after his taxes had been paid, the Corporation is not liable. In my opinion the City is responsible for the act of the Chamberlain. If the evidence does not clearly show that he was expressly authorized by the City Council to issue the execution, such an inference may be drawn from the evidence. At all events, it is clear from the law and evidence, that the Chamberlain acted *bona fide* when he issued the execution, in pursuance of his general authority to collect the taxes, and his act was afterwards ratified and adopted by the Corporation when it received the money. In issuing the execution, the Chamberlain, if he was guilty of a tort, committed it in the discharge of a purely municipal duty, as agent of the City, and the rule *respondet superior* applies. The taxes were collected by the City's officer for the City, and it got the benefit from



the money. He was appointed by the Corporation in obedience to the statute, to perform a duty for the peculiar benefit of the City, and, if he made a mistake in the performance of his duty, his superior must answer for the wrong. It seems to me it is beyond controversy that the wrong here was done by the officer while in the legitimate exercise of a duty of a corporate nature, which was devolved upon him by law and by the authority of the Corporation. This case differs materially from *McSorley v. The Mayor of Saint John* (1), even if the judgment of this Court and of the learned Chief Justice of Canada had prevailed. Unfortunately, the majority of the Supreme Court of Canada held an opposite view, and reversed the judgment of this Court. But there the learned Chief Justice, in giving judgment, bases his opinion upon what was beyond doubt the fact, that none of the parties, acting under the statute being considered in that case, were in any sense of the term the servants of the Corporation, or in any way subject to their orders or control. The Corporation of Saint John had no power, authority, or supervision, corporate or otherwise, over the proceedings, which were purely statutory. And yet the majority of the Supreme Court of Canada, in that case, held that the City of Saint John and Sandall, the Chamberlain, were liable because a man was arrested who had not been assessed. If, under the facts of the *McSorley Case*, the City could be held liable, how possibly can the City of Portland escape liability here for the act of an officer of the Corporation, appointed by them and under their control, in the performance of a duty imposed upon him as such officer?

Then, again, it is said that the learned Judge misdirected the jury in telling them that the defendants were liable even if the plaintiff owed the taxes. That language is used in connection with that part of the charge where the Judge says the defendants were liable for the neglect of the constable in not looking for goods and chattels before making the arrest. Now, by the execution the direction to the constable was to levy and sell of the goods and chattels, lands and tenements of William T. Fanjoy, in the City and County of Saint John, and for want of goods and chattels, etc., to take William T. Fanjoy

1889.

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FANJOY  
v.  
THE CITY OF  
PORTLAND.

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Tuck, J.

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(1) 6 Can. S. C. R. 531.

1889.  
FANJOY  
v.  
THE CITY OF  
PORTLAND.  
Tuck, J.

and deliver him to the keeper of the gaol of the City and County of Saint John. It was the duty of the constable, before he arrested the defendant, to search for goods and chattels, etc., or to ask to have them pointed out to him. Apparently the constable made the arrest without doing either of these things, for which an action might be maintained against him. The question is, will it lie against his superior, the City of Portland? A similar question is referred to by my brother KING in giving judgment in *Main v. The Town of Saint Stephen* (1), but he refrained from expressing an opinion on the point, as he did not consider it necessary for the decision of the case. In this connection, *Mill v. Hawker* (2) is cited. In the Exchequer Chamber, Blackburn, J., says: "Now, with regard to the other question which has been raised and discussed, as to whether the corporators were liable, it is one of considerable importance and great difficulty. If it were necessary to decide that question, we should require time for consideration, and possibly, when we had considered it, our decision would not be unanimous." I incline to think that the City is not responsible for this wrongful act of the constable, any more than if he had taken fifty dollars from Fanjoy when the execution called only for two dollars. But in the view I take of His Honor's charge and of the case, it is not necessary for me to decide the question, or say anything further upon the point. I think the plaintiff is entitled to recover, irrespective of the Judge's charge upon this branch of the case. The uncontradicted evidence of the plaintiff shows conclusively that in September, 1885, he paid the Chamberlain his taxes for that year, the very taxes for which he was arrested in November, 1887. For this improper arrest the Corporation is liable in this action. Then why send the case down for another trial, even if the Judge was wrong in his charge as to the Constable's right to look for goods and chattels, when the result of a new trial must be the same as the last one? It may be said that, as the matter now stands, it is impossible to say upon which branch of the Judge's charge the jury acted in finding for the plaintiff. The sufficient answer to that, I think, is that the jury were bound to find

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1) 26 N. B. Rep. 330.

(2) L. R. 9 Exch. 309; 10 Exch. 92.

for the plaintiff on that part of the charge where the direction was right, and, therefore, it is immaterial if they based their finding upon that part which was wrong. In any event, the plaintiff, under the evidence, was entitled to a verdict. There was no question of fact for the jury to find. All they had really to do was to assess the damages.

1889.  
FANJOY  
v.  
THE CITY OF  
PORTLAND.  
Tuck, J.

Still another view is presented to us why there should not be a new trial on the ground of misdirection. It is said that the defendants cannot take this point now, not having taken it in the Court below. That at the trial the defendants justified the act of the constable, by virtue of the execution which he had, and tried the case out in that way, never raising any question as to the City being responsible for the acts of the Chamberlain and the constable. A number of authorities were cited in support of this contention. In *Brown v. The Bristol & Exeter Ry. Co.* (1), it is held that as the point had not been made at the trial, the objection could not prevail. *Doe dem. Heathcote v. Hughes* (2); *Seery v. Brayley* (3); *Rogers v. Peck* (4), and *Lynch v. Keegan* (5) were cited to the same effect. These authorities seem to be conclusive in deciding that where a point is not taken at the trial it cannot prevail in a motion for a new trial. But I prefer to rest my judgment as to the objection to the charge upon the ground, as I have already said, that the verdict could not have been otherwise than for the plaintiff.

Another ground has been taken upon which there must be a new trial, unless the plaintiff consent to reduce the damages, which were assessed by the jury at four hundred dollars. This sum, to my mind, is out of all reason and conscience. Here we have a man who never but once, during the years he lived in Portland, paid his taxes direct to the Chamberlain. He paid always to the collector or constable. Having failed in business in Portland, he was taxed in Portland only on his poll, \$2.25. By mistake, and through no malice, Mr. Wisely, the new receiver of taxes, issued an execution against Fanjoy, although he had paid the amount to the late Chamberlain, Mr. Moore. The constable Howard carried this execution around

(1) 7 H. & N. 1006.  
(2) 2 F. & R. 296.

(3) 3 All. 315.  
(4) Bert. R. 318.

(5) 3 Puga. 645.

- 1889. with him from the spring of 1886 till November, 1887, before he made the arrest. Again and again he asked the plaintiff to pay. He was met with the answer that the money was already paid, and the plaintiff had a receipt. Not finding it, he paid the money under protest, and was discharged. There was no harsh treatment, and no want of courtesy towards him. And yet this jury, apparently because a corporation has to pay the bill, say that this young man was injured to the extent of four hundred dollars. Why, it is probably more money than he ever had at one time in his life, and quite equal, perhaps, to his wages for a year. The damages are simply outrageous, and it is high time this Court marked its disapproval of large verdicts against corporations in cases like the present. It is too bad that a city should be put to such expense for so small a cause.
- FANJOY  
v.  
THE CITY OF  
PORTLAND.  
Tuck, J.

In my opinion there must be a new trial, unless the plaintiff consent to reduce the damages to one hundred dollars.

FRASER, J. I agree.

PALMER, J. This was an action for false imprisonment, tried before Mr. Justice Fraser, at the Saint John Circuit. The pleas were, Not guilty, and a justification of the arrest by virtue of an execution issued under the 28th section, cap. 46 of 48 Vic., for \$2.25 taxes assessed on the plaintiff in the City of Portland.

The proceeding was proved to be directed by the receiver of taxes for the City of Portland. There was some conflict of evidence as to whether the plaintiff did not owe some other taxes, but there can be no doubt but that the plaintiff paid the tax for which this arrest was made, on the first of September, 1885.

The only authority which would authorize the arrest is that contained in the 28th section referred to, which enacts as follows :

“ If any person assessed shall not pay the amount for which he is liable, either on his own account or in a representative capacity, into the office of the Chamberlain of the City of Portland, within ten days after notice of such assessment ; or if

the personal or legal representative of any person assessed, in case of the death of such person, shall not pay the amount of such assessment within ten days after notice, such notice being either printed or written, and delivered to him personally, or at his last place of business or abode, the Receiver of Taxes for the said City of Portland may issue execution in the form (B) in the schedule hereto against the person so assessed, specifying in such execution whether it be on such person's own account or otherwise, which execution may be enforced by any constable or policeman of the said city, according to the tenor thereof, and shall run into and have full force and effect in all parts of the City and County of Saint John, including the City of Saint John, and the keeper of the gaol of the City and County of Saint John, when any such person is arrested under such execution, shall receive and keep such person pursuant to the tenor thereof; provided always, that proof of the due service of such notice and non-payment of the amount stated therein shall be first made before a Justice of the Peace of the said City and County, or the Receiver of Taxes, to the satisfaction of the said Receiver; and that no person arrested under or by virtue of such execution shall be confined more than one day for every forty cents of the whole amount contained therein, nor be entitled to the benefit of the limits of the gaol."

From this, it is apparent that two things must concur in order to authorize an execution to issue, and the consequent arrest. First, there must be a notice of such assessment to the person against whom the execution is to issue, and then the taxes must remain unpaid ten days after such notice; so that if the plaintiff here either did not receive a notice of the taxes for which he was arrested, or he paid them, the statute clearly does not authorize the arrest.

The only notice proved to have been served upon the plaintiff for taxes was the one in evidence, which was in the words and figures following:

"CHAMBERLAIN'S OFFICE,  
"CITY OF PORTLAND, August 1st, 1885.

"Mr. WILLIAM FANJOY,

"Your assessed Taxes in the City of Portland for 1885, exclusive of Taxes for Alms House, are as follows:

1889.  
FANJOY  
v.  
THE CITY OF  
PORTLAND.  
Palmer, J.

1889.	"Taxes for County purposes.....	\$ 25
FANJOY	"Taxes for City purposes.....	2.00
v.		
THE CITY OF PORTLAND.	"Total taxes.....	\$2.25
		11
Palmer, J.		"\$2.14

"Notice. 5 per cent. discount will be allowed on the above taxes if paid into this office during the month of August, and a receipt obtained therefor, after which time execution will be issued.

"W. A. MOORE,

"Chamberlain and Receiver of Taxes.

"Please bring this notice.

"Received payment September 1, 1885.

"W. A. MOORE, Chamberlain.

And not only did the plaintiff prove that he went to the Chamberlain's office and paid the amount which he was so notified to pay, but he produced the very notice itself, with the receipt of the Chamberlain that the same was paid on the 1st September; thus putting it beyond controversy that this man's arrest was not warranted by law.

Some point was made as to the City's liability, but it is clear that the plaintiff was arrested and made to pay these taxes over again by the action of the Receiver of Taxes, and that money has gone into the coffers of the City of Portland, and therefore this is a much stronger case than that of *McSorley v. The Mayor of Saint John* (1).

I therefore think the rule should be discharged, if the plaintiff will consent to reduce the damages to \$250.

If I was inclined strictly to follow the case of *Abell v. Light* (2), and *Hadden v. White* (3), and *Morton v. Bartlett*, (4), I would be compelled to sustain the verdict for the whole \$400; but I think these cases have extended the rule to its extreme limits, if not beyond all reason. I am well aware that to assess the damages in an action for false imprisonment is in the peculiar province of the jury, and the Court can have no means of ascertaining what the amount should be, but, in any

(1) 4 P. & B. 479.  
(2) 1 Han. 240.

(3) 2 Kerr 463.  
(4) 2 Puga. 215.

case where the Court interferes on the ground that the damages are excessive, they must go into all the circumstances of the case, put themselves in the place of the plaintiff and defendant, and when they have done that, if they can see, not that they would not give so much, but that no fair-minded man could have done so, unless he proceeded upon some erroneous principle, and when they have reached this conclusion, then they will send the case to another jury.

In the cases I have referred to, the Court apparently did reach that conclusion from the facts. If I had been sitting in their place, I think I would not have done so; but be that as it may, although, I think, when a corporation, as in this case, by its officer deliberately arrests a man and forces him to pay money he ought not to do, and then compels him to prosecute a suit in the Supreme Court for redress, and then, instead of allowing judgment to go by default, contests it to the end, I, for one, if on the jury, would give liberal damages, and, as a Judge, I would not be disposed to interfere with the verdict for any reasonable amount; yet I think \$400 is too much under all the circumstances of this case, and it should be reduced to \$250. I am aware that a man's reputation may be injured financially, and also his feelings hurt, by being arrested in the presence of his comrades, but I think \$250, under the circumstances of this case, would be amply sufficient to cover any damages from that source, as well as all extra legal expenses and trouble that the plaintiff might reasonably expect to be put to in a case of this description.

I therefore give my voice for a new trial unless the plaintiff consents to reduce the verdict to \$250.

WETMORE, J., after referring to the evidence, continued: The learned Judge in his charge says the plaintiff is entitled, to recover by reason of there not being any evidence of want of goods and chattels to warrant the arrest, nor any evidence of a request by the constable to plaintiff to point out goods and chattels.

"As regards the payment of the taxes, the plaintiff says he paid them. The defendants say, No; that the taxes paid were those of an uncle of plaintiff's, and not the plaintiff's.

1889.

FANJOY  
v.  
THE CITY OF  
PORTLAND.

Palmer, J.

1889.

FANJOY  
v.  
THE CITY OF  
PORTLAND.

Wetmore, J.

This point is dependent upon the evidence of plaintiff. The plaintiff makes an uncontradicted statement; because it is uncontradicted here, there is not a particle of evidence to be shewn against it. But supposing this were not so. He comes and gives his testimony; you are bound to believe it, unless there is something to satisfy you to the contrary. There is not a shade or shadow of anything to shew the plaintiff did not tell the truth." This appears to me an absolute direction to find that the taxes were paid exactly as the plaintiff says. Transposing this part of the charge, as thus, you are bound to believe the plaintiff's statements unless there is something to satisfy you to the contrary, and his statements are uncontradicted. There is not a particle of evidence to be shewn against it. This appears to me a clear direction to find for the plaintiff.

The learned Judge says, of course the credibility of a witness is entirely a matter for the jury, but they are reasonably bound to give a fair and reasonable credence to the statement of this man, in view of the want of contradiction. Further on: But looking at all the events, at the circumstances here, if you believe what he tells you to be true, then under this view of the case he is also entitled to recover.

The learned Judge speaks of the notice being served on the plaintiff which may have been intended for his uncle, and the uncle may have got plaintiff's notice; that he paid the amount, less the discount, 11 cents, to Mr. Moore, the Chamberlain, and got his receipt. There is nothing to discredit this statement. The mere fact that the letter "T" is not there, is not, to his mind, of any moment at all. The question is, did he pay the Chamberlain \$2.14, the actual amount he was called upon to pay, less the discount? Is there anything to show that they were not his taxes? It is claimed that the plaintiff should have called his uncle to shew it was not he who paid these taxes. The burthen of this, the learned Judge thought, was on defendants. The plaintiff was not interrogated as to whether he paid them for his uncle or for himself. The defendants might have called the uncle, who might have stated plaintiff was only his agent for the payment of the taxes. The learned Judge details the circumstances, and then says, "that in



that view of his case, clearly the City of Portland had not a shadow of right to issue this execution. Therefore, in any point of view, the plaintiff is entitled to recover on both branches of the case." I am quite aware that mere isolated parts of the charge are not to govern; the whole charge must be considered. But, considering the whole charge, it appears to me it amounts to nothing less than an absolute direction to find for the plaintiff; that the plaintiff had actually paid his taxes. It appears to me there was some evidence for the jury upon this point. It appears from the assessment books that William Fanjoy was assessed, also that William T. Fanjoy, the plaintiff, was assessed, both in Ward No. 1. The plaintiff had been assessed for several previous years by the name of William T. Fanjoy. He tells the constable he paid the taxes to him. This was not the fact, and it is possible, when he conversed with Howard, he may have forgotten to whom he did pay them, but it does not seem a very likely occurrence that, if he paid the taxes to the Chamberlain and got his discount, which he could not get from the constable, he would not have recollected paying them to the Chamberlain, if he did so, and instead of saying so, to say he paid them to the constable, and when asked if he was sure, to reply, Yes—(I am referring to the constable's evidence). The plaintiff in his direct examination, on being asked the question by Howard, whom he paid them to, said—"I could not remember just then as I had not thought of the matter." The plaintiff had several conversations with Howard. At the last one previous to the arrest, he told him to whom he had paid the taxes. It seems strange to me, even if the plaintiff had not thought of the matter before Howard first spoke to him, it was a matter he certainly would at once have thought of, and rather seriously, too, for this being called on to pay money a second time, and that under an execution, is rather a startling operation, and that he would not have put off telling Howard to whom he paid the money until the conversation next preceding the arrest. The plaintiff also told Howard he would see Mr. Moore about the taxes. On cross-examination, he says, that in December, 1886, he told Howard he recollected to whom he had paid the money, but he had not found the receipt,

1889.

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FANJOY  
v.  
THE CITY OF  
PORTLAND.  

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Wetmore, J.  

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1889.  
FANJOY  
v.  
THE CITY OF  
PORTLAND.  
Wetmore, J.

but would have a thorough look for it; that some time, in passing he might call at the Chamberlain's office with it. He was asked did he promise to go and see Mr. Moore, his answer was: "I said I would go to see him about it; I said nothing more about it; I did not promise in any way." The plaintiff seems, at all events, to have a queer idea of what amounts to a promise. He may have had the Statute of Frauds in his mind, and did not consider a promise, not being in writing, amounted to anything. Mr. Moore died before this execution issued. The two Fanjoys were taxed. The taxes were entered in the the Chamberlain's book, William Fanjoy's marked paid at a time corresponding with the receipt, and William T. Fanjoy's was not marked paid. At the time of the arrest he said he had a receipt. The constable asked to see it, and plaintiff hunted in his pocket for it, but he did not have it. One would suppose, after having been called upon several times for his taxes, and relying on a payment, and knowing as he must have known, how much depended on the production of the receipt, he would not have required to hunt his pockets to know whether or not he had it about him. The notice served on him was not in his name, or the name he was known by, as far as I can judge from the evidence. The notice was to William Fanjoy. The receipt was for payment by William Fanjoy; the entry in the Chamberlain's book of payment of William Fanjoy's taxes. With the greatest deference for the view the learned Judge had on the trial, it seems to me all this was evidence, and very pregnant evidence, as to whether or not the plaintiff had paid his own taxes. At all events, it should have been submitted to the jury untrammelled by, to my mind, the absolutely conclusive remarks of the learned Judge. It may be said the plaintiff had a good cause of action whether he had paid his taxes or not. This may be so, but what effect the payment of the taxes had upon the jury it is impossible to say. Something beyond the mere arrest and its attending circumstances must have conduced to secure so large a verdict as \$400.

Further, as to the payment of taxes, I do not think the evidence shews the plaintiff paid his own taxes. It must be admitted that both William Fanjoy and William T. Fanjoy were properly taxed, as it happens, each in the same amount,

and that the plaintiff had always been taxed by the name of William T. Fanjoy, and this for several years. He had a notice to pay the taxes of William Fanjoy served on him. Without the necessary notice, no other proceeding could be taken to recover the tax. The notice to pay another rate-payer's taxes, those of William Fanjoy, amounted to nothing. It is said the plaintiff adopted this notice. I do not see very well how he could do that, but if he could, he would have to adopt all the results, and put himself in the place of William Fanjoy. His going to the Chamberlain's office with this notice, which was a notice to William Fanjoy to pay his taxes, handing the notice to the Chamberlain, paying the money and taking receipt for William Fanjoy's taxes, the Chamberlain marking the taxes paid, are such results as the law will adopt for him. The service of the notice upon the wrong party will not relieve him. It was his business to look at the notice, and on discovering it was not for him, not to have acted upon it, or to have the mistake corrected. It may be he acted in perfect good faith, which I have no doubt the Chamberlain did; still that won't help the matter. His adoption of William Fanjoy's notice without any explanation to, the Chamberlain, and William Fanjoy's taxes having, by the plaintiff's own conduct, been marked paid, the plaintiff cannot now get the benefit of the payment on account of his own taxes. Suppose a notice requiring the payment of John Smith's taxes, who had been regularly rated, had been served on the plaintiff by mistake, which the plaintiff took to the Chamberlain's office, saying nothing, but handed him the notice, paid the amount, and took a receipt for these taxes of John Smith, could it be said the plaintiff had paid his own taxes? I think not. It appears to me it was the plaintiff's business to see he paid the proper taxes. The notice, though it must be served before any further proceedings can be taken, still there is the published notice of the assessment, and the notice does not affect the taxes themselves, however it may affect their collection. The plaintiff knew, or ought to have known, he was taxed as he always had been taxed, by the name of William T. Fanjoy, and he should not have misled the Chamberlain by paying William Fanjoy's taxes, which he certainly did. Though he may not

1889.

FANJOY  
v  
THE CITY OF  
PORTLAND.  
Wetmore, J.

1889.  
FANJOY  
v.  
THE CITY OF  
PORTLAND.  
Wetmore, J.

have intended it, the legal consequences which he unfortunately has brought upon himself, are, however, the same.

Then as to the damages, four hundred dollars. This, I think, should not be sustained, considering the circumstances. I have carefully referred to all the material parts of the evidence to shew my justification for objecting to the amount of the damages.

The plaintiff was served with a notice that should been served on his uncle, William Fanjoy. The constable told him he had a claim against him for taxes, which plaintiff said he had paid to the constable, as the constable says; the plaintiff says he did not at first know to whom he paid them. The plaintiff, however, as he says, subsequently told Howard to whom he had paid them. The constable advised him to see the Chamberlain and have the matter righted, which he certainly promised to do, from his own evidence, though he thinks proper to say he made no promise at all, the constable waiting for several months before acting upon the execution, and speaking to plaintiff several times about the taxes, recommending him to pay them, and telling him, when he found the receipt, he could get the amount back from the Chamberlain; the arrest made with no aggravating circumstances; though it was made in Mr. Everett's store, and several persons present, it does not appear anyone knew of it, except Mr. Everett (who was told by the plaintiff), the constable, and perhaps the other man whose name is not given. Mr. Everett does say perhaps there were a number of customers in the store he wanted the plaintiff to wait upon, but it does not appear any one of them knew of the arrest. The opportunity the plaintiff had of paying the \$2.45, with the constable's assurance it would be returned on production of the receipt, with, no doubt, the money in his pocket; the constable, as requested, consenting to go to the plaintiff's house that he might look for the receipt; the constable going with the plaintiff, and not taking him there, as put forward, can it be said this verdict is not monstrously outrageous? Is it not one the Court should lay its hands upon? I rather think if any of the jurors had erroneously secured an execution to be issued against a fellow-citizen, under circumstances as in the present case, entirely

without any aggravating features, with the full opportunity of the plaintiff paying the small amount, \$2.45, under protest, and having the amount returned on production of the receipt, he would be somewhat startled at four hundred dollars damages being awarded against him, and that with no ostensible damage whatever proved. In fact, I incline strongly to to the opinion that jurors, as a rule, whenever they can get a chance at a corporation, are quite too much in the habit of awarding excessive damages—a kind of proceeding, I think, this Court should discountenance whenever the opportunity fairly offers, as this case certainly does.

1889.  
FANJOY.  
v.  
THE CITY OF  
PORTLAND.  
Wetmore, J.

The defendants are, in my opinion, liable to the plaintiff by reason of want of proper effort to levy on goods and chattels, and also for issuing execution without the notice required by law. The notice requiring payment from William Fanjoy, though served on the plaintiff, amounted to nothing, in my opinion. The similarity of the names William Fanjoy and William T. Fanjoy, does not, as I think, in law help the plaintiff's case. The action, I think, should have been brought in the County Court. Though the jury have thought proper to award four hundred dollars damages, without any circumstances to warrant such a finding, to my mind, does not alter the case. As the defendants are clearly liable for some damages, twenty dollars I think ample; but if my learned brethren think this too small, say \$50. I would consent to a reduction to that amount, giving the plaintiff the option of taking that amount and running the chances of a certificate for costs beyond County Court costs.

Sir JOHN C. ALLEN, C. J. I also agree that the verdict should be reduced to \$100.

KING, J., took no part.

*New trial, unless Plaintiff consents  
to reduce verdict to \$100.*

1888.

July 31.

IN THE MATTER OF THE QUEEN'S COUNTY ELECTION.  
PALMER, PETITIONER, and BAIRD, RESPONDENT.

*Dominion Controverted Elections Act — Election Petition — Service — Power of Court to order Petition off files, where not properly served — Extending time for service — Respondent evading service.*

Where a copy of an election petition, with the accompanying notices, under The Dominion Controverted Elections Act (R. S. C., c. 9), has not been properly served, the Court has power to order the petition to be taken off the files of the Court. *Rogers v. Wallace* (24 N. B. Rep. 459) followed.

The service of such petition at the respondent's residence by delivering a copy thereof to his wife, he being at the time absent from the Province, is not sufficient.

Where a service made at the respondent's residence is relied upon to constitute a personal service, it should be clearly shewn that the petition came to the respondent's possession or knowledge.

Where an order was made under sec. 10 of the Act extending the time for service of a petition, and it was not served within the time allowed, the Court has no power afterwards to grant a further extension.

Sub-sec. 2 of sec. 32 of the Act, providing that an elector may be substituted for the petitioner in case of delay, only applies to a petition that has been properly served. Per TUCK, J.

Per ALLEN, C. J. — That as there was strong evidence that the respondent had left his residence to avoid being served with the petition, and the fair inference was that it had come to his knowledge, it ought not to be taken off the files of the Court, nor the petitioner adjudged to pay the costs of the application.

June 16, 1888. *L. A. Currey*, on behalf of the respondent moved for a rule *nisi*, calling upon the petitioner to show cause why the petition and all papers connected therewith should not be taken off the files of the Court, with a stay of all proceedings, and for the costs of the application; on the ground that the petition and accompanying notices had not been served within the time required by the Dominion Controverted Elections Act, (R. S. C., cap. 9).

The affidavits setting forth the facts relied upon on the motion for the rule, and those read on shewing cause, are sufficiently referred to in the judgments, and need not be given here.

The following sections of the Dominion Controverted Elections Act, (R. S. C., cap. 9), were referred to:

Sec. 10. "Notice of the presentation of a petition under this Act, and of the security, accompanied with a copy of the petition, shall, within five days after the day on which the petition has been

presented, or within the prescribed time, or within such longer time as the court or any judge thereof, under special circumstances or difficulty in effecting service, allows, be served on the respondent or respondents. If service cannot be effected on the respondent or respondents, either personally or at his or their domicile, within the time granted by the court or judge, then it may be effected upon such other person, or in such other manner as the court or judge, on the application of the petitioner, directs.

1888.

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 PALMER  
v.  
BAIRD.

Sec. 11. "An election petition under this Act, and notice of the date of the presentation thereof, and a copy of the deposit receipt shall be served as nearly as possible in the manner in which a writ of summons is served in civil matters, or in such other manner as is prescribed."

Sec. 64. "The court or a judge shall, upon sufficient cause being shown, have power, on the application of any of the parties to a petition, to extend, from time to time, the period limited by this Act for taking any steps or proceedings by such party."

A rule having been granted, returnable on the second Saturday,

June 25, 1888, *Geo. F. Gregory* shewed cause. It is submitted: 1. That the respondent is not entitled to the order he seeks, as the petition is properly upon the files of the Court, and while, if the petition has not been served, the respondent may be entitled to a stay of proceedings, the petition should not be taken off the files. If the petitioner fails to carry on the proceedings, it is the right of any other elector to apply to be substituted for the petitioner; and that right exists from three months after the presentation of the petition until the expiration of six months. Sub-sec. 2 of sec. 32, cap. 9, R. S. C. During this period the petition cannot be taken off the files. As against the public, there can be no stay within the six months. 2. The petition was properly served upon the respondent, either as personal service, or as service at his place of abode. The return of the deputy sheriff is a matter of record, and it requires overwhelming evidence to show that the return is untrue. Sec. 11 of the Act (R. S. C., cap. 9) declares that the service shall be as nearly as possible in the manner in which a writ of summons is served in civil

1888.

PALMER  
v.  
BAIRD.

matters. Sec. 7 of cap. 37, Consol. Stat., prescribes the mode in this Province. The authorities show that if a party resorts to any acts or device in order to evade service, such acts amount to a knowledge of the process sought to be served, and that knowledge is equivalent to personal service. Or if the papers have come into the possession of a party, or if he knowingly evades and prevents them doing so, it amounts to a personal service. The affidavits clearly show that there was an intent to avoid the service of the petition, and it must be presumed that the respondent had knowledge of it. As to the effect of knowledge, see *O'Regan v. Berrymount* (1); *O'Leary v. Graham* (2); *Rhodes v. Innes* (3); *Williams v. Piggott* (4); *Morris v. Coles* (5); *Phillips v. Ensell* (6), and Archbold's Practice (11 ed.) 209. The possession of the petition is not negatived; the service only is denied. In law, the petition was in the respondent's possession when it was in his place of abode, and with his wife. If what was done is not equivalent to a personal service, then the service at the residence was sufficient. While a writ of summons in this Province can only be served at the defendant's place of abode if he is within the jurisdiction of the Court, this being a Dominion matter, a service at the place of abode is a good service, if the respondent is at the time within the Dominion. The decision in *Robertson v. Laurie* (7) recognizes the right of this Court to control the service outside the territorial jurisdiction of the Court. The service upon either the wife or Alexander Baird at the respondent's residence, is a compliance with the statute, and is a service at his domicile. When secs. 10 and 11 of cap. 9, Rev. Stat. of Can., are read in connection with sec. 7 of cap. 37, Consol. Stat., it is clear that the word "domicile" in section 11 means the place of abode, or residence. The place where a person resides is presumed to be his domicile, until it is otherwise shown. Here it was shown that the respondent's residence or place of abode was in the City of Saint John, where the service was made. See *Yelverton v. Yelverton* (8); Bouv. Law Dict., "Domicile"; *Walcot v. Botfield* (9); *Bempde v.*

(1) 1 Kerr 167.

(2) 5 All. 105.

(3) 7 Bing. 329.

(4) 1 M. &amp; W. 574.

(5) 2 Dowl. 70.

(6) 1 C. M. &amp; R. 374.

(7) 14 Can. S. C. R. 253.

(8) 1 Sw. &amp; Tr. 574; 29 L. J., Mat. 34.

(9) 18 Jur. 570.



*Johnstone* (1); *Lord v. Colvin* (2); *Hoskins v. Matthews* (3); *Putnam v. Johnson* (4); *Inhabitants of Fitchburg v. Inhabitants of Winchendon* (5); Story's Confl. Laws, secs. 43 and 44. If the Court should be of opinion that there has not been a good service, then under sec. 64 of the Act an extension of time may now be granted, and thus save the rights of the petitioner. As to the right to grant an extension of time after the expiration of the time within which a step should be taken, see *Wheeler v. Gibbs* (6); *Lord v. Lee* (7); *Leite v. Johnston* (8); and *Sheffield v. Sheffield* (9).

1888.

PALMER  
v.  
BAIRD.

*L. A. Currey*, in support of the rule. The case of *Rogers v. Wallace* (10), disposes of the first objection. In that case the petition was removed from the files of the Court because the copy served was defective, and therefore there was no service of the petition within the meaning of the Act. In the cases of *Wood v. Emmerson* (11), and *Ruel v. Temple* (12), the Court granted a stay. Admitting that after three months from the time of the presentation of the petition it is a public proceeding, a party cannot be substituted after the petition is dead. If it has been filed and served, then a third party may be substituted for the petitioner. Sec. 32, sub-sec. 2, only applies after service of the petition. As to the service: there has been none, either actual or constructive. The affidavits show no facts upon which to base the argument of evasion; no facts to show an intentional avoidance of knowledge. A party is not called upon to seek to be served, and if he does not do so he is not open to the charge of wilful evasion. It is due to the respondent and to the electors who supported him, that the petitioner be required to follow the statute strictly, and, if he fails to comply with the statute, objection should be taken to his proceedings. The service at the residence is a statutory provision, and it is indispensable that, in order that there should be good service, the respondent be within the Province. The affidavits place it beyond doubt that when the first service

(1) 3 Ves. 198.

(2) 4 Drew. 366; 5 Jur.

(3) 8 DeG., McN. &amp; G. 13. N. S. 351.

(4) 10 Mass. 488.

(5) 4 Cush. 180.

(6) 3 Can. S. C. R. 374.

(7) L. R. 3 Q. B. 404.

(8) L. R. 5 Eq. 296.

(9) L. R. 10 Ch. 206.

(10) 24 N. B. Rep. 459.

(11) 26 N. B. Rep. 532.

(12) Id. 569.

1888. was attempted, the respondent was in the Province of Nova Scotia. It is equally clear that the Deputy Sheriff was mistaken and that he served the petition upon the respondent's brother instead of the respondent. See *In re Montmagny Dominion Election Petition* (1). No case goes so far as to decide that the possession of a process must be negatived, if the knowledge is negatived. There is a difference between a service at common law, and a statutory service. The case of *Parrott v. Roberts* (2) decides that where the mode of service is regulated by statute, it must be strictly complied with. See also *James v. Dupres* (3). The petition is a matter in which the public are interested, and the respondent could not waive any required step. *McAllister v. Bishop of Rochester* (4); *Rogers v. Wallace* (5); *In re Kingston Election Case* (6); *In re Kingston Election Case* (7); *Maude v. Lowley* (8); *Reg. v. Bertrand* (9). As to the word "domicile:" the Parliament has chosen to use this word, and the Court must seek to give it its proper and usual meaning. It is not used as synonymous with the word "residence." *Moorhouse v. Lord* (10); *Udny v. Udny* (11). As to the application for extension of time under sec. 64, it is submitted that there are three answers: first, such an order could not be granted on this application; secondly, neither this Court nor any Judge thereof has jurisdiction to grant it; and thirdly, no facts have been shown which would justify the granting of it. See per King, J., in *Ruel v. Temple* (12); *The Glengarry Election Case*, *Purcell v. Kennedy* (13). The case of *Wheeler v. Gibbs* (14) has been either wholly overruled or distinguished by the *Glengarry Election Case*, and is no authority for the application.

*Cur. adv. vult.*

The following judgments were now delivered:

TUCK, J. A rule *nisi* was granted in this case, calling upon the petitioner to show cause why the petition and other papers connected therewith should not be removed from the files of the Court.

(1) 15 Can. S. C. R. 1  
(2) 2 P. & B. 388.  
(3) 1 All. 506.  
(4) 5 C. P. D. 194.  
(5) 24 N. B. Rep. 459.

(6) 30 U. C. C. P. 389.  
(7) 39 U. C. Q. B. 139.  
(8) L. R. 9 C. P. 165.  
(9) L. R. 1 P. C. 520.  
(10) 10 H. L. Cas. 272.

(11) L. R. 1 Sc. App. 441.  
(12) 28 N. B. Rep. 509.  
(13) 14 Can. S. C. R. 453.  
(14) 3 Can. S. C. R. 374.

It appears from the affidavits read at the time the motion was made, that the petition was filed on the 3rd day of March last, and, on the 5th day of March, Mr. Justice King made an *ex parte* order extending the time for service until the 12th day of April, 1888. There were also filed with the Clerk, notice of the petition, an affidavit of John Rankin, deputy sheriff of Saint John, in which he states that on the 27th day of March he served a copy of the petition and notice upon Elizabeth, the wife of the respondent, at his residence in the City of Saint John, and at the time of such service the wife said that her husband had gone to Canning to see his mother, who was sick, and that the wife refused to take the papers. Also an affidavit of Samuel Clifford, who had a special deputation from the Sheriff of Saint John, that on the 2nd day of April, 1888, he personally served the respondent, by delivering to him copies of the petition, notice of presentation, the date thereof and of security, deposit receipt, and Judge's order enlarging the time for service; together with an affidavit of Mr. Gregory, verifying the papers.

An affidavit of Mr. Currey, after stating in detail the papers on file, refers to a conversation which he had with Mr. Gregory, agent and attorney for the petitioner, when he told Gregory there had been no legal service, and made a proposition to him that all proceedings might be dropped without costs. The respondent, in his affidavit, says that he left Saint John on the 26th of March, for Canning, in the Province of Nova Scotia; that he was at Canning the whole of the 27th of March, and got back to Saint John on the 28th of March. He contradicts the affidavit of Samuel Clifford, as to personal service; and says that after spending Sunday night with Lemuel A. Currey, he left Saint John at seven o'clock in the morning of Monday, the 2nd day of April, and went to the Parish of Wickham, in Queen's County, to see his mother, who was ill at that place; and states in detail how he was driven by his brother, Alexander W. Baird, from Saint John to Rothesay, and by mail waggon to Kingston, in Kings County, and after walking about eight miles to John Toole's, of Kars, was driven by him to Robert Jones', and by Jones to his domicile in Wickham. He gives as a reason for going in this way, that the ice

1888.

PALMER

v.

BAIRD,

Tuck, J.

1888.  
PALMER  
v.  
BAIRD.  
Tuck, J.

was not good, and the ordinary way of travelling by the river was not safe; he says, further, that he was at Wickham at the time Clifford swears that he served him; that he has never seen the petition and other papers, or any or either of them, and does not know the contents thereof. In paragraph 11 of his affidavit, he says that, although he resides in Saint John, he had always and preserved an intention of returning to Wickham as his legal domicile. He states his belief that, through mistake, the papers were given by Clifford to his brother, Alexander W. Baird, who, he states positively, was not a member of his household. Manfred McDonald, M. D., Leonard S. Vanwart, and Isaac Gerow, all of Wickham, swear that the respondent was at that place, about 35 miles from Saint John, on Monday, the 2nd day of April, and remained there, in their company and that of other persons during a part of the afternoon, and until after nine o'clock in the evening. Arthur W. Brown, master mariner, in his affidavit, says the respondent came on board his schooner, lying at Kingsport wharf, near Canning, Nova Scotia, on the 27th March, and that he came there in consequence of messages sent by deponent to inform him that the vessel had met with disaster.

Alexander W. Baird is respondent's brother, and swears that in the evening of 2nd of April, between the hours of 8 and 9 o'clock, Clifford served him with certain papers, when he was at his brother's residence in Germain street, Saint John. He states also what conversation took place between him and Clifford.

In shewing cause against the rule, affidavits of Edward M. Dickie, Robert T. Babbit, and David W. Pilkington, were read for the purpose of showing that when the petition and other papers were filed, and at the time of their alleged service, the respondent's usual place of abode and domicile were in the City of Saint John. In these affidavits it is stated that the respondent resides and practices law in the City of Saint John; that he has been taxed for a number of years in Queen's County as a non-resident; that when nominated at two different elections for Queen's County, he was described as of the City of Saint John; that his father and mother had resided at

Wickham, and that respondent did not come to Queen's oftener than three or four times a year.

1888.

PALMER

v.

BAIRD.

Tuck, J.

Samuel Clifford makes a second affidavit, whereby he swears that the statement in his first affidavit is true; that he has known George F. Baird, the respondent, and Alexander W. Baird, well for many years; that he lives at 269 Germain street, Saint John, and respondent's house has the same number; that he received petition and other papers from John Rankin, deputy sheriff, on 31st March, and saw respondent's wife and child on Germain street, between 7 and 8 o'clock in the evening of that day, and watched for respondent until 11 o'clock at night. On the 2nd of April Clifford saw Lemuel A. Currey go into the back door of George F. Baird's house and saw Alex. W. Baird on Germain street, but not near the house. He states how he called at respondent's house, between 8 and 9 o'clock in the evening, and made the service; and from the part of his face which he saw, and from his voice, he has no doubt that he personally served George F. Baird. Referring to a conversation with the respondent, he says that he never expressed any doubt that it was George F. Baird he served; and this denies part of a statement made in Baird's affidavit.

George G. King makes an affidavit that Alexander W. Baird informed him in the Royal Hotel, on the 7th June, that the petition had been served on him, Alexander, when his brother, George, was five hundred miles away.

Lewis H. Bliss, a student with Mr. Gregory, says in his affidavit that he came to Saint John on the 2nd April, to see about the service of the petition; that he went to respondent's residence, 269 Germain street, and inquired for him, rang the bell twice, when the door was unlocked by Mr. Lemuel A. Currey, who informed him that Baird was not at home just then, did not know when he would be in, but he might be found in his office; that he searched for Baird until 10 o'clock at night, when Rankin, the deputy sheriff, told him that Baird had been served.

In an affidavit made by George F. Gregory, he speaks of the difficulty in serving the respondent, the extension of time by the Judge, and of the conversation with Rankin as to service on

1888.

PALMER

v.

BAIRD.

Tuck, J.

respondent's wife ; that, being fearful of the first service, he sent Bliss to Saint John to see Rankin and get personal service. He states that Rankin refused to make affidavit that he believed Baird was in the Province at the time the papers were served on his wife ; that respondent did not file an appointment of agent in this case, although he did appoint Mr. Currey in another case, where respondent was petitioner. He then refers to a conversation with Currey at Fredericton, in Easter Term, in which Currey asked him when he was going to set the cause down for trial, and Gregory requested him to file an appointment as agent of Baird, when Currey replied, " I suppose I might as well ; I'll see about it ; " but said nothing about the petition not being properly served. He states another conversation between them at the Royal Hotel, Saint John, on the 16th of June, when Currey asked him if he knew about the mistake in serving the petition, and he said he did not, but did not hear Currey say that all proceedings might be dropped without costs ; that he had seen paragraphs in the newspapers that Baird did not know, or had no information that papers had been served. Finally, Mr. Gregory swears that he believes " respondent has persistently, and that by cunning devices, endeavored to evade service of the petition," and that Rankin informed him that he believed respondent had endeavored to evade service.

Leave was given to respondent's counsel, Mr. *Currey*, to prepare and read affidavits in reply, and he produced one made by himself, and another by respondent. Currey, in his his affidavit, denies the statement in paragraph 12 of Gregory's affidavit, wherein it is stated that " he asked Gregory if he would apply for an order to set the cause down for trial " ; but, on the contrary, Gregory came and asked him to file an appointment as agent, and he replied that he had no authority in the matter. He denies also that he was agent and attorney for respondent in this petition. Respondent swears that Currey was not his agent ; that Bliss's affidavit is misleading ; and denies that he tried to evade service, and says that he walked openly in the streets of Saint John.

Several preliminary objections were taken by Mr. *Gregory*, petitioner's counsel, before he argued the main points. It was

contended that the applicant was not entitled to have the petition taken off the files of the Court. The same point was taken in *Rogers v. Wallace* (1), but the Court granted the application. Then it was urged that the petitioner could not be restrained, inasmuch as sub-sec. 2 of sec. 32, cap. 9, R. S. C., provides that, "if at the expiration of three months after such petition has been presented the day of trial has not been fixed, any elector may, on application, be substituted for the petitioner, on such terms as the Court or a Judge thinks just"; that the petition, after three months had passed, became public property. This sub-section can refer only to a petition which has been properly served. If a petition has been presented, but notice of the presentation and of the security has never been served, in the manner prescribed by sec. 10 of cap. 9, in that case the Court or a Judge would have no power to fix the day of trial, and sec. 32 would not apply.

The application is properly made to this Court, and it was not necessary to make a preliminary objection, nor that the respondent should delay action until an application had been made to fix some time and place for the trial of the petition. The respondent has the right to come to this Court and ask to have the petition removed from the files. *Rogers v. Wallace* decides this. If the respondent has the right to apply to this Court, there has been no unnecessary delay. It may be that he was not bound to come here, but might have waited and made objection when application was made to a Judge to fix some time and place for trial. Affidavits of service of petition were not on file until the 7th of May, and this rule was moved at the next Term, on the 16th of June. Besides, the petitioner had taken no steps to have the petition set down for trial. Suppose that Mr. *Currey* has been waiting and searching since the third day of March, as has been stated, it does not therefore follow that he has applied too late, or that he was attorney and agent for the respondent.

At the argument, the learned counsel applied to the Court, if it should be determined that the service was not good, to grant the necessary remedy and fix a time within which the petition might be served, in order to prevent a failure of jus-

1888.

PALMER

v.

BAIRD.

Tuck, J.

1888.

PALMER

v.

BAIRD.

Tuck, J.

tice. In my opinion the Court has no power under the statute to grant this application. Mr. Justice King, on the 5th March, extended the time for the service of petition till the 12th April; and the limit of time having long since elapsed, the Court has no jurisdiction on this application to make a further extension. The point was taken in the York election petition, *Ruel v. Temple* (1), that a Judge having once extended the time could not do it again; but afterwards it became unnecessary for the Court to determine that question. In the Glengarry election petition, *Purcell v. Kennedy* (2), the Supreme Court of Canada held that they had no power to extend the time. Some discussion took place as to striking out certain portions of petitioner's affidavits, and at the same time replying to such portions, but from the views which I entertain it is not necessary to consider this.

This brings me to the main point in the case: Is the service good as personal service? If the only question to be decided was that of the respondent's domicile, I should say, upon the affidavits, that he had lost his domicile of origin, and that he was, when the affidavits were filed and efforts made to serve them, domiciled in the City of Saint John. It is true, he says he had, and always preserved, an intention of returning to Wickham, in Queen's County. But the affidavits on behalf of the petitioner shew that the respondent quitted Queen's long since, and has, with his wife and family, for some years made his residence in the City of Saint John. He practices law and has his place of business there, and goes to Queen's County only a few times a year. He did not take his habitation in Saint John for a special and temporary purpose, but has by his acts made it his permanent residence. If every act of a man shews that he meant to change his residence, he can hardly get rid of the effect of his acts by saying that he never had such an intention. But even if it had been made to appear clearly that the respondent's domicile was Wickham, it does not necessarily follow that, failing personal service, notice of the presentation of a petition, and of the security, etc., must be made there. In sec. 10, cap. 9, R. S. C. (Dominion Controverted Elections Act), there are these words: "If service

(1) 26 N. B. Rep. 509.

(2) 14 Can. S. C. R. 453.



cannot be effected on the respondent or respondents, either personally or at his or their domicile, within the time granted by the Court or Judge," etc.; and sec. 11 says: "An election petition under this Act, and notice of the presentation thereof, etc., shall be served as nearly as possible in the manner in which a writ of summons is served in civil matters." Now, sec. 7, cap. 37, Consol. Stat. (N. B.), provides "that the service of a writ of summons may be made by personal service within the jurisdiction of the Court, or in case the defendant has a known place of abode within the jurisdiction, such writ must be served at such place of abode, by delivering a copy thereof to the wife of the defendant, or to an adult person residing in the house, and being an inmate of the family;" then follows the provision that to make "this service good there must be an order of the Court or a Judge, made upon an affidavit shewing the circumstances of such service, and that the place where such writ was served was, at the time of such service, the usual place of abode of such defendant, and that he was at the time of the service within the jurisdiction of the Court." This is the manner prescribed for the service of a writ of summons in civil matters, within the Province, and the section provides for service at the defendant's place of abode; and reading together secs. 10 and 11 of cap. 9, R. S. C., it may with force be argued that service of an election petition at the usual place of abode is sufficient. I prefer, however, to rest my decision of this point upon the ground that Saint John, and not Wickham, was the respondent's domicile.

The learned counsel for the petitioner, at the argument, did not contend that the respondent was within the jurisdiction of the Court on the 27th March last, when petition and other papers were handed to his wife by Rankin. In fact, Rankin refused to make an affidavit that he believed George F. Baird was within the Province at the time, and this was necessary before a Judge could make an order that such service be deemed good. Consol. Stat., cap. 37, sec. 7. From the affidavits, too, of Arthur W. Brown and the respondent, it appears conclusively that he was at Canning, in the Province of Nova Scotia, when the papers were given to his wife. According to the affidavit of Rankin, Mrs. Baird, the wife, told him, when

1888.

PALMER

v.

BAIRD.

Tuck, J.

1888.

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PALMER  
v.  
BAIRD.

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Tuck, J.

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he served the papers, that her husband had gone to Canning to see his mother, who was sick. This is not contradicted, and must be taken to be true. Mrs. Baird might have made an affidavit, and has not. The respondent says that he never saw the petition and other papers, has no knowledge of them, and does not know their contents. From reading his affidavit one can hardly help coming to the conclusion that Geo. F. Baird never had a copy of the petition in his possession, had no knowledge of it, nor that any papers had ever been served on his wife. This may seem difficult of belief; that his wife did not tell him when he came home that during his absence important papers, having reference to his election, had been served upon her. Mrs. Baird may have intended by her answer to deceive the deputy sheriff, or she may have supposed that her husband had gone to Canning, in Queen's County. Because his wife, at one time, had knowledge and possession of the petition, it does not follow, as of course, that she communicated the facts to her husband. The mere fact that the papers were left at the respondent's house, with his wife, does not of itself fix him with possession of them, and I have no right to say, even if Mrs. Baird gave an answer intending to deceive the deputy sheriff, that she did so with her husband's knowledge and consent.

It appears from the affidavits that Mr. *Currey* had, in his professional capacity, intimate relations with the respondent, and was his attorney and agent in another petition arising out of the election in Queen's County; and because of this, and because he was at Baird's house on the 2nd of April, it has been argued that certain conversations had with *Currey* should affect Baird. Even if such conversations took place as are set forth in the affidavits used on behalf of the petitioner, and they have a serious bearing on this case (which, in my opinion, they have not), Baird ought not to be prejudiced by them, for both he and *Currey* swear positively that *Currey* was not his agent and attorney in relation to the petition now under consideration, and there is no proof to the contrary. No notice of his appointment as agent was filed with the Clerk, and his intimate relations with the respondent does not establish an agency. In order to fix respondent with personal service, there

must be circumstances to satisfy the Court that the petition has come to his knowledge or possession, and I think there are no such circumstances in this case. See *Rhodes v. Innes* (1); *Williams v. Piggott* (2); *Phillips v. Ensell* (3); and *Emerson v. Brown* (4).

*Robertson v. Laurie* (5) is not an authority in this case. There the Chief Justice of Nova Scotia made an order to serve the petition out of the jurisdiction, Robertson being in the City of Ottawa: here, no such order was made; there was only an extension of time to serve. The question here is, has any service at all been made.

In addition to the service said to have been made by Rankin, by delivering petition and other papers to respondent's wife, there is also the personal service which Clifford swears he made on the 2nd April. Here a question of fact arises: Samuel Clifford, in two affidavits, one made the 23rd April, the other in June, swears positively that on the 2nd of April he personally served George F. Baird, the respondent, with copy of petition, notice of presentation, etc.; that he had known Baird for years, and knew him at the time of service from the part of his face which he saw, and from his voice. This affidavit of Clifford is met by the respondent, who swears that at the time of the alleged service he was not in the City of Saint John, but at Wickham, in Queen's County. This statement is verified by the affidavits of Manfred McDonald, Leonard S. Vanwart, and Isaac Gerow, all of Wickham, in Queen's County. There is also the affidavit of respondent's brother, Alexander W. Baird, who says he was the person served at the time and place mentioned by Clifford, and he gives a detailed account of what was said and done at the time of such service. Doubtless Clifford thought that he gave the papers to the respondent, but in this he must have been mistaken; and if he were under cross-examination this could be easily demonstrated. A person may be mistaken, and sometimes is, as to the identity of his best known friend, meeting him, too, under circumstances when one would think a mistake could not very well occur. If this is true, it is not to be

1888.

PALMER

v.  
BAIRD.

Tuck, J.

(1) 7 Bing. 331.  
(2) 1 M. & W. 574.

(3) 1 C., M. & R. 374.  
(4) 7 M. & G. 476.

(5) 14 Can. S. C. R. 258.

1888.

PALMER

v.  
BAIRD.

Tuck, J.

wondered at that Clifford mistook one Baird for the other, upon the facts which he himself states. But, apart from this, Clifford's statement cannot be accepted without disbelieving the oaths of five men, who, if they have sworn falsely, have done so wilfully. Clifford may be wrong, without being guilty of a wilful mis-statement. I think the respondent was not in the City of Saint John, but at Wickham, when this service is said to have been made.

The petitioner's counsel, in addition to the other reasons urged, contends that, even if this is the correct view, and if the respondent was in Nova Scotia when the papers were served on his wife, he ought not to succeed in this application, because by cunning devices he has endeavored to evade service of the petition, and has been guilty of fraud. Beyond a doubt, the circumstances of this case are peculiar. It is singular that just before the petition was served on the respondent's wife he should have gone to Canning, in Nova Scotia, to see a disabled vessel, and that she should have told Rankin that he had gone to Canning to see his mother, who was sick; there being as a matter of fact a Canning in Queen's County, New Brunswick, where Baird might naturally go, and where, of course, Rankin would think he had gone, as well as a place of the same name in Nova Scotia. Something, however, must have occurred after the first attempt at service to make the petitioner's attorney suspicious that all was not right; for, on the 31st March he sent another set of papers to the sheriff's office, Saint John, with directions to have them personally served. These were placed in the hands of Clifford, who, until 11 o'clock at night of the 31st March, watched for and endeavoring to serve Baird, but without success. Sunday intervened, when no service could be made, and on Monday morning, the 2nd April, the respondent, having stayed Sunday night, not at his own house, but with his attorney, Mr. *Currey*, left the City of Saint John for Wickham, Queen's County, by way of Rothesay and Kars, in Kings County. And during his absence, between 8 and 9 o'clock, P. M. on the 2nd. Clifford, the turnkey, who lived next to the respondent, and knew the parties well, by mistake, served Alexander W., who happened to be at his brother's house.

It is hard to believe that all these occurrences took place by accident, but it is more difficult to conclude upon the facts disclosed, that George F. Baird could have had any certain or even partial knowledge, that there would be one effort made on the 27th March, to serve him with petition, and another on the 2nd April. If he did know, he must have received the information from some one who had no right to impart it, and in a manner not stated in the affidavits. Suspicious as the circumstances look, more is required to warrant the Court in coming to the conclusion that the respondent was endeavoring by a trick to evade service; nor do I see anything in the conduct or sayings of the respondent, or of any one authorized to speak or act for him, to justify me in deciding that the respondent so acted, after the two abortive attempts at service, as to lead the petitioner, his attorney or counsel to believe that there had been good service of the petition. There is an absence of proof to fix the respondent with fraud or knowledge of the efforts which were made to serve the petition, and there is his sworn statement that he had no such knowledge, and that he did not fraudulently attempt to elude service.

The rule must be made absolute and with costs.

PALMER, J. This is an application to set aside or stay the proceedings on an election petition, filed under the Dominion Controverted Elections Act, complaining of the return of the respondent as a member of parliament for Queen's County, on the ground that no copy of the petition, and the accompanying notices, required by the Act, were served within the time directed by the Act. It appears that the petition was regularly filed on the third day of March last, and Mr. Justice King made an order extending the time for the service of it to the 12th of April last. It appears by the affidavit of John Rankin, the deputy sheriff of Saint John, that on the twenty-seventh day of March he left with the respondent's wife, in the City of Saint John, a copy of the petition and the requisite notices. His affidavit does not state that he thought the respondent to be then within this Province, and it appears by several affidavits that he was then in the Province of Nova Scotia, and that he returned to Saint John on Wednesday

1888.

PALMER

v.

BAIRD.

Tuck, J.

1888.

PALMER

v.

BAIRD.

Palmer, J.

evening, the twenty-eight of March, and then left for Queen's County early in the morning of the 2nd day of April, where he had a farm and another place of residence, which was his domicile of origin.

The turnkey of the jail at Saint John left at respondent's Saint John dwelling, with Alexander W. Baird, (who came to the door in answer to that officer's ring of the bell), another copy of the petition and the requisite notices, and, supposing it was the respondent, made an affidavit that he had delivered it to the respondent himself. No person who reads the affidavits of the respondent, Alexander W. Baird and the persons who were with the respondent on that day, can come to any other conclusion than that the turnkey was mistaken, and that he gave the papers to Alexander W. Baird instead of the respondent. I have not lost sight of the fact that the turnkey has again reiterated his statement, since the making of the several affidavits that contradict this, but I have no hesitation in saying, that if he made such an affidavit after he knew of all the evidence to the contrary, he has done what is calculated to discredit him altogether, either in regard to his intelligence or his honesty.

The result of the petition not being served in the time directed by the statute, we decided in *Rogers v. Wallace* (1), to be, that this Court has no jurisdiction to proceed further in the matter; and the only question remaining is, whether it has been served according to the statute, and, if not, whether the respondent has estopped himself from denying service. To decide this, it is necessary to have a clear view as to how the statute has directed it to be served; and this is contained in secs. 10 and 11 of cap. 9 of the Revised Statutes of Canada. (His Honor here read the sections).

In this case, as no order was made as to the manner of service, it could only be done in the same manner as a writ of summons should be. To ascertain how this should be done, as this was a service within the jurisdiction, we must have recourse to sec. 7 of cap. 37, Consol. Stats., which enacts that "the service of a writ of summons may be made by personal service within the jurisdiction of the Court; or in

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(1) 24 N. B. Rep. 459.

case the defendant has a known place of abode within the jurisdiction, such a writ may be served at such place of abode by delivering a copy to the wife, etc.; provided such last mentioned service shall not be deemed good without the order of the Court, or a Judge thereof, to be made upon affidavit, showing the circumstances, etc., and that the defendant was at the time within the jurisdiction of the Court." There are two conclusive reasons why the service on the wife in this case by Rankin, could not be good, namely, the respondent was not within the jurisdiction at the time, and, if he had been, there was no order to perfect the service. This reduces the question to whether there was a personal service, or its equivalent, within the meaning of the Act, and I have no doubt whatever but that the turnkey is mistaken when he says that he gave the papers personally to the respondent, but that it was to Alexander W. Baird, respondent's brother, he gave them, and that the respondent was at that time some fifty miles away, in Queen's Co., from which place he did not return until the fifth day of April last, and he remained in Saint John from that time until he left for Ottawa, where he remained attending parliament until the time for service expired.

We decided in the case of *Rogers v. Wallace* that the non-compliance with the statute, with respect to the service of the petition within the time required, goes to the jurisdiction of the Court to proceed in the matter; and the distinction between the power of the Court to dispense with, or allow a variation of, proceedings in matters over which they have jurisdiction, and in cases where they have not, is a well recognised one.

In *Ex parte Tindall* (1), which was a case where the Bankruptcy Act required personal service of the summons in order to make an Act of Bankruptcy, Turner, L. J. says: "Here the case is still more difficult to maintain, for we are proceeding under a statutory jurisdiction which requires personal service. If we can dispense with one objection to the service, we might dispense with another." It is not for us to say what induced the Legislature to be so particular to lay down how and when petitions are to be served; but, if it were, when the whole Act is looked at it is seen how many persons'

1888.

PALMER

v.

BAIRD.

Palmer, J.

(1) 6 DeG., McN. &amp; G. 741.

1888.

PALMER

v.

BAIRD.

Palmer, J.

rights are affected and how severely breaches of the law by persons, other than the respondent, are visited upon the respondent, and the evident intention of the Legislature that the subject should be investigated in as short a time as possible after it occurred, we can see good reasons why the particular and certain notices should be given (and without which no proceedings should be had) to the respondent, as to the public, and that there should be a standard stated in the Act by which all parties interested could tell when this was done, for most important rights are given to the respondent which he can exercise from that time and which are taken away in five days after—the right to take any preliminary objection to the petition—and if not taken in that time the petition is at issue. Under such a statute, nobody, I think, can doubt that in order to make the service complete, the acts making it should be complete, so that the parties or any other person interested could get the knowledge not only that it had been served, but when. What I mean is, that if a copy of the petition was served on the wife when the respondent was not in the Province, and if the respondent came home some days afterwards and saw such copy—even if that could be considered a personal service, it certainly could not be so considered until the respondent actually got it; and even in such a case, when the Court would infer that the respondent got the copy, it would find itself in a difficulty when called upon to decide when he so got it; and that would be necessary in order to determine when the preliminary objections were to be considered, or when issue was joined. This difficulty would not exist in case of ordinary suits in which the Court has jurisdiction to proceed, for, in that case the Court having jurisdiction whether the service is made or not, it can always do justice by granting time. If the service has not been properly effected, the Court can give to the defendant time or prevent the cause being at issue. On the other hand, if the Court has no jurisdiction it cannot proceed at all, and no doubt there has not been a personal service in this case—which means a delivery of the copies to the respondent himself. But it is contended that the facts proved shew that he either had a personal knowledge of such service and so acted in the matter as induced the petitioner to



believe that he was serving them according to law: in fact, that it was a fraudulent contrivance by the respondent, knowing that the petitioner intended to serve those papers, to induce him to serve them as he did, under the belief that he was serving them according to law, and thereby lull the petitioner into the belief that they had been properly served, and consequently to take no other means to serve them until too late; and that he thereby waived service, or estopped himself from denying it.

The first difficulty that arises in this case is the question: Whether the respondent can waive or dispense with, by estoppel or otherwise, any of the provisions of the statute to proceed in these matters, and the argument that he cannot do so is founded on the consideration that an election petition is not a matter in which the petitioner and respondent are alone interested, but the whole public, particularly the electors of the County, are the substantial parties. And no doubt it is true, and this is a good reason why the respondent could not dispense with anything that the public is interested in, such as the publication of the copy and other things of that character; but it appears to me that the service of the petition on the respondent is intended entirely for his benefit, and therefore he might dispense with it, or by fraud estop himself from the right of requiring it. I admit that no Court should adjudge that he had done so without the clearest evidence; and when fraud is relied on, as in this case, it should be clearly proved. In order to determine whether it has been proved or not in this case it will be necessary to ascertain what would be fraud in such a case, and that, no doubt, is difficult to define; but I may say generally that I do not think it would be fraudulent for a respondent, knowing that the other side are wishing to serve an election petition on him, not to assist him to make such services, or even to keep out of the way, so long as he does not attempt to mislead in order to have the service effected in some other way that he believes may be done. I never heard of any decision that it was the duty of a person to enable another to put him into law, or that he could not take any honest and lawful means to prevent his being brought within the jurisdiction of any Court, nor do I think that if a person knew that

1888.

PALMER

v.

BAIRD.

Palmer, J.

1888.

PALMER

v.

BAIRD.

Palmer, J.

his opponent had done (of his own motion and without any assistance, inducement or misleading from him) what he thought was a service, and he knew, or thought, it was not, that it would be any duty to give information on the subject in order to have proper service made; but this, I think, is the limit. The moment a respondent undertakes to do anything calculated to influence the other side to believe in a state of things, false in fact, to induce him to effect a service improperly and to leave it improperly done, and thereby prevent it being properly done, then I think he would be and is estopped from denying these facts. If it is distinctly proved that Alexander W. Baird was, by the contrivance of the respondent, placed in his house to represent him so that the turnkey should serve these papers upon Alexander W. Baird instead of himself, and he did so believing it was the respondent, and the petitioner in consequence refrained from all further attempt to serve it to be within the time, I think it would be a travesty of justice not to hold respondent bound. Whether there has been proof in this case that we can safely rest upon, that this or its equivalent has been done, is the question we must decide. There are two rules that must not be lost sight of in an attempt to do this. The first is, that the onus of proving this is upon the petitioner; secondly, that, as the charge involves a charge of criminal fraud, no Court ought to find it without strong evidence to support it.

In the argument I could not, and still cannot divest myself of the suspicion that the respondent's actions were done with the design I have mentioned. The fact that he was in Nova Scotia, at Canning, when Rankin made the first service and that his wife should say he was going to see his mother, and that she kept from respondent the fact that the petition had been left there, as she must have done, because he swears he had no knowledge of the service of it until the middle of May; that he should have passed the night of Sunday at Currey's instead of his own house and left on Monday morning, and then his brother being found at his own house next evening—I confess had this effect whether these things ought to have done so or not.

At the argument, as I have said before, these things did

1888.

PALMER

v.

BAIRD.

Palmer, J.

cause a suspicion in my mind that the whole was the result of a scheme, of which suspicion my mind is not yet wholly divested; but I have carefully gone through the affidavits with the view of discovering, if I could, whether there was sufficient evidence on which I ought to find it was so, and after having done so I find there is an absence of anything proved that might not be perfectly consistent with entire innocence. First, as to the respondent being in Nova Scotia, it was clear that he was just where his wife said he was, in Canning, and also that he went there because his proper business called him there. As for his wife saying he was going to see his mother, that was true; for on his return he did go to see his mother, who was sick, at Wickham in Queen's County; but if what the wife intended to make the Sheriff believe was, that her husband was then at Canning, Queen's County, to see his mother, this would be a most suspicious circumstance if it was exactly correct, and if it was such evidence as the Court could consider; but all experience shows that the most unreliable evidence in any case is that as to what a person understood another person to have said. The unintentional slip of a word and not distinctly understanding, and the possibility of not remembering exactly, all tend to show its unreliability. Besides, I do not think that what the wife said is evidence that the Court can consider at all on this question of fraud. The law does not allow such evidence. And as to being at Currey's house, he said he was there as he had to leave early next morning and had to transact some business with Currey. There is nothing improbable or illegal in this, and it is consistent with honesty, no matter how one may suspect it; and although it is highly probable that he might besides have gone there to keep out of the way of service, this would not be dishonest, as I have said, unless he procured his brother to be served in his stead, of which there is really no evidence at all, however much any person may suspect it.

At the argument I was much impressed with the statement in Mr. Gregory's affidavit that Mr. Currey had applied to him as to setting the cause down for trial, but when Mr. Currey contradicted this, and stated that the conversation was on Mr. Gregory's application to him, it had a very different complexion and could afford no support to the petitioner's contention.

1888.

PALMER  
v.  
BAIRD.  
Palmer, J.

I therefore think this case comes within the case of *Rogers v. Wallace*, and as the matter has been contested by the petitioner and he procured the affidavit of the turnkey that he served the petition on the respondent, after he had affidavits which ought to have convinced him that he had made a mistake, and refused to allow the matter to stop without this application, I think he should pay the costs.

WETMORE, J. The petition was filed 3rd March, 1888, and on 5th March an order was granted by Mr. Justice King, extending the time of service until the 12th April following. On 27th March, 1888, notice of the presentation of the petition, with the other requisite papers, was served at the St. John residence of the respondent upon his wife. It appears that the affidavit of Mr. Rankin, the deputy sheriff, who served them, of his belief that the respondent was at the time of the service within the jurisdiction of the Court, could not be obtained, the respondent being in fact in the Province of Nova Scotia at the time of such service. Our Provincial Act, Consol. Stat. cap. 37, sec. 7, under the heading "Non-bailable process," enacts as follows:—"The service of a writ of summons may be made by personal service within the jurisdiction of the Court; or in case the defendant has a known place of abode within the jurisdiction, such a writ may be served at such place of abode by delivering a copy thereof to the wife of the defendant, or to an adult person residing in the house and being an inmate of the family of the defendant; provided that such last mentioned service shall not be deemed good without the order of the Court, or a Judge thereof, to be made upon affidavit shewing the circumstances of such service, and that the place where such writ was served was, at the time of such service, the usual place of abode of such defendant, and that he was at the time of the service within the jurisdiction of the Court according to the belief of the person serving such summons; stating his reason for such belief."

Apart from the deputy sheriff not being able to make the necessary affidavit, the fact of the respondent being out of the jurisdiction of the Court at the time of such service, is clearly proved by the affidavit of the respondent and that of Arthur

W. Brown. There is also an alleged personal service on the respondent by one Samuel Clifford. He swears that he made personal service of the petition and other papers on the respondent on the 2nd of April, 1888, at the City of Saint John, and also with a copy of the Judge's order enlarging the time of service. This affidavit is most distinctly contradicted, and it is clearly shewn that the man Clifford who swears to making such personal service, did not serve the papers upon the respondent; but that whatever service was made, was made upon one Alexander W. Baird. An affidavit of Clifford, read on shewing cause against this rule, shews the service he made was made at respondent's residence about twenty minutes past 8 o'clock in the evening of the 2nd April, at which time it appears beyond all doubt that the respondent was in the Parish of Wickham, in Queens County. There is the affidavit of the respondent stating he was not the person served. He states he was not at his residence at any time during the 2nd of April; he gives a full account of where he was, of his leaving Saint John about 7 o'clock in the morning, and proceeding to Gaagetown; and of how he travelled, and with whom, and of his return to the City of Saint John on the 5th of April. Alexander W. Baird swears he is the person upon whom the alleged service of papers was made; that it was he who drove the respondent on his journey as far as Rothesay when he left Saint John on the morning of the 2nd of April, when he returned to Saint John; and that he, though not a resident at respondent's family, was there on the evening of the 2nd April, and that Clifford served him with the papers. The respondent's statement is corroborated by affidavits of several persons who saw him on his journey and at Wickham. There is an affidavit of each of the following named persons:—Manford McDonald, Leonard S. Vanwart and Isaac Gerow, in addition to the affidavits of respondent and Alexander W. Baird, which to my mind shew beyond all possibility of doubt that the respondent was not in the City of Saint John on the 2nd of April after about 7 o'clock a. m., and that Alexander W. Baird, and not the respondent, was the person served with the papers. I do not quote from the affidavits, some of which are quite lengthy, as the fact of Alexander W. Baird being the person served is so abundantly plain from the affidavits.

1888.

PALMER

v.

BAIRD.

Wetmore, J.

1888.

PALMER

v.

BAIRD.

Wetmore, J.

The modes provided for service by The Controverted Elections Act are, by personal service by sec. 10, and by sec. 11 service may be made as nearly as possible in the manner in which a writ of summons is served in civil matters; or still further, service may be in such other manner as is prescribed. Neither of the two modes of service provided by the Act has been complied with, as is perfectly evident from the affidavits, and no other manner has been prescribed. There has therefore not been any legal service of the necessary papers, and in my opinion the rule should be made absolute to remove the proceedings from the files of the Court, or all further proceedings in the matter should be stayed, which amounts to the same thing. The points have been expressly decided in the *Montmagny Election Case* on appeal to the Supreme Court. It is quite unnecessary to comment upon the affidavits used in the case; but if comment was desirable, I think some of those used on shewing cause are quite open to animadversion. If it were necessary to decide the point raised respecting the respondent's domicile, I should say there was nothing in it. As to further time being now granted for service of the papers, I think the Court has no power now to extend the time. This point has been decided in the *Westmorland Election Case*.

The rule, I think, should be made absolute with costs to the respondent.

ALLEN, C. J. I am unable to agree with the majority of the Court, that the petition in this case should be taken off the files.

Though I do not dispute that Mr. Baird had a legal right to evade the service of the petition if he thought proper; and though I have no doubt that Clifford is mistaken in thinking that he served Mr. Baird, (the respondent), on the 2nd April, I cannot avoid the conclusion that Mr. Baird expected that an effort might be made to serve him with the petition, and that he purposely kept out of the way to avoid it; otherwise, why should he leave his own house on Sunday evening, and spend the night with Mr. Currey; leave there the next morning at 7 o'clock, and be driven in a waggon to Rothesay, when, if he did not anticipate that some attempt might be made to serve him with the petition, he could as conveniently have slept in his own

house that night, and taken the train for Rothesay the next morning, about 8 o'clock. To my mind, the inference is irresistible, that he acted as he did, in order to avoid service of the petition, either at his own house or at the train on Monday morning.

1888.  
PALMER  
v.  
BAIRD.  
Allen, C. J.

Again, I think there was a clear intention to mislead the deputy sheriff when he went to Mr. Baird's house on the 27th March, to serve the petition.

It was literally true, as stated by Mrs. Baird to the officer, that the respondent had gone to Canning—but not to Canning in this Province; and it was also true, that he was going to see his mother who was ill; but not on that occasion when he went to Canning, in Nova Scotia, as Mrs. Baird must have known. Why should she have said anything to the officer about her husband going to see his mother who resided in Queen's County, in this Province, though not in the Parish of Canning, when she knew that he had gone to Nova Scotia, unless the intention was to mislead the officer? There was not the slightest connection between Mr. Baird's visit to Nova Scotia, and his intended visit to his mother in New Brunswick; they were not to be continuous; he was to return to his residence in St. John, before going to see his mother in Queen's County. That the officer was misled into the belief that the respondent had gone to Canning in this Province, and that he had gone there to see his mother, is very evident, from the fact that he then served the copy of the petition on Mrs. Baird, which, from his experience in serving processes, he would not have done if he had understood that the respondent had gone to Canning in Nova Scotia. This is also evident from the fact that he afterwards refused to make the ordinary affidavit of service of process at the dwelling house, when served upon a member of the defendant's family, stating the belief of the officer, that at the time of such service the defendant was within the limits of the Province, for reasons stated to him at that time.

It has been said that the officer may have misunderstood what Mrs. Baird said to him at the time he gave her the petition; but if he has mis-stated it, Mrs. Baird has had an opportunity of correcting it, and stating exactly what she did say on that occasion; but as she has not done so, it must be assumed

1888.  
PALMER  
v.  
BAIRD.  
—  
Allen, C. J.

that what the officer has sworn to as having been said by her, is strictly correct.

It may be said that the respondent is not responsible for what his wife said to the officer, but in the absence of any affidavit from Mrs. Baird, and from the fact of her refusing to receive the petition from the officer, I cannot avoid the conclusion that she was acting under instructions either directly or indirectly from her husband, both in what she said to the officer, and in her refusal to receive the petition.

I do not doubt that the respondent had not, as he swears, seen the papers that were left with his wife, up to the time of making his affidavit; and because he had not seen them, he might, perhaps, safely swear that he had no knowledge of their contents; but nobody can doubt that he knew that an election petition had been filed against him, and of the charges against him which it contained, as the Act requires it to be published in the county which he represented. He might also reasonably expect that an effort would be made to serve him with a copy of it while he was in the Province, before he left for Ottawa.

It is difficult to believe that he was not informed by his wife on his return from Nova Scotia on the 28th March, that some paper had been left with her for him on the previous day, unless, indeed, she was instructed by somebody not to say anything to him about it. The affidavit of the deputy sheriff states that at the time he served the copy of the petition and other papers on Mrs. Baird he informed her what they were, and that he left them with her for her husband; so that she must have known they were papers of some importance, which, under ordinary circumstances, it was her duty to give to her husband on his return. It therefore seems very improbable that she should not have given them to him, or, at least, have told him of them, unless she had been previously instructed not to do so. There is no affidavit from Mrs. Baird explaining this—to me—very singular conduct on her part.

A similar remark may be made respecting Mr. Alexander W. Baird upon whom (supposing him to be the respondent) a copy of the petition, etc., was served by Clifford on the 2nd April, and who, like Mrs. Baird, gives no explanation whatever as to



whether he did or did not make any communication to the respondent about the papers, though he knew that they were copies of the election petition and other papers relating to it, and the purpose for which they were served.

1888.  
PALMER  
v.  
BAIRD.  
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Allen, C. J.

If no communication was made to the respondent, either by his wife or his brother, of the service of the papers upon them respectively, I think it must have been in consequence of some preconcerted arrangement, (I can see no other reasonable way of accounting for it) and that the circumstances strongly lead to the conclusion that the respondent was a party to it, or, in some way aware of it.

The respondent has sworn that he never saw the copy of the petition and other papers referred to in the affidavit of the deputy sheriff, and of Clifford, or either of them, and had no knowledge or information of them or either of such services until copies of the affidavits setting forth such alleged services were shown to him, and had no knowledge of the contents of the petition at the time of swearing to his affidavit (the 15th June last).

The circumstances of the case are so suspicious as to the respondent's ignorance of the service of the petition on his wife, and in the absence of any affidavit either from Mrs. Baird or from Mr. Alex. Baird, that I think the Court ought not to order the petition to be taken off the files, but should allow the petitioner to proceed upon it if he can. At all events, I think the rule should not be made absolute with costs, as the petitioner has done all that he reasonably could do to effect the service and was prevented from completing it by conduct and statements of Mrs. Baird, which I cannot avoid thinking were intended to mislead, and certainly had the effect of doing so.

FRASER, J. agreed with the majority of the Court.

KING, J., not having heard the argument, took no part.

*Rule absolute to take petition  
off files, with costs.*

1890.

## IN RE SARAH JANE CLEVELAND.

February 13.

*Statute of Distributions, 26 Geo. 3, c. 11; Consol. Stat., c. 78, sec. 4*  
—*Personal property of married woman dying intestate—Husband's right to—Next of kin.*

The personal property of a married woman, dying intestate, vests in her husband, *jure mariti*, to the exclusion of her next of kin. (PALMER, J., dissenting.)

The right of a husband to the personal property of his deceased wife, as declared by sec. 17 of 26 Geo. 3, c. 11, is not affected by the omission of such a provision in the Consol. Stat., c. 78, sec. 4, regulating the distribution of personal property, said sec. 17 being only declaratory of the then existing law, and not conferring any new rights upon the husband.

This was an appeal from a decree of the Probate Court for the County of Westmorland, distributing the surplusage of the personal property of the estate of Sarah Jane Cleveland, who died intestate, to her husband, Bartholomew Cleveland.

The sole question was whether the surplus separate personal property of a wife, dying intestate, should go to her husband or to her brothers and sisters.

October 16, 1889. *W. Wilberforce Wells*, in support of the appeal. The husband is not next of kin to the wife, and, therefore, cannot claim the surplus separate property of his deceased wife, as next of kin under the Statute of Distributions. It will be contended, however, that he is entitled to such property by virtue of his common law marital rights. This contention, it is submitted, is not law. A husband surviving his wife was not at common law entitled to her personal property by virtue of his marital rights, but being entitled to the grant of administration of her estate by statute 31 Edw. 3, he was entitled, as all administrators were, to the exclusive enjoyment of the residue, after payment of the debts. In ancient times, when a person died without making any disposition of his goods and effects, the king seized and took them as general trustee of the kingdom. Afterwards they were given to the ordinary by the Crown, and he might seize and keep them. 2 Black. Com. 494, 514, 515; Wms. on Exors.

(7th ed.) 401. Under the statute 31 Edw. 3, the husband was entitled to the grant of administration, and the law being until the passing of the Act 22 & 23 Car. 2, that no administrator was bound to distribute, but was entitled to enjoy the residue of the estate absolutely without accounting to any one, the husband, who was administrator to his wife, became entitled, the same as all other administrators, to the surplus personal property of the wife. 2 Black. Com. 515. Wms. on Exors., (7th edition) 1488. In England, this state of the law continued until the Statute of Distributions, 22 & 23 Car. 2, cap. 10, was passed. A doubt having arisen as to whether, under this statute, the husband, as administrator of his wife's estate, was compelled to distribute, the 25th section of Act 29 Car. 2 was passed, which declared that the Act 22 & 23 Car. 2 should not be construed to extend to the estate of *femes covert* who should die intestate, but that their husbands might have administration of their personal estate, and receive and enjoy it the same as they might have done before the passing of the Act. This provision has been continued in force in England to the present time. In this Province, the first Statute of Distributions, 26 Geo. 3, cap. 11, sec. 14, provided for the distribution of the personal estate of any person dying intestate, in the same way that the Act 22 & 23 Car. 2, provided that it should be distributed; and section 17 contained substantially the same provisions as those contained in 29 Car. 2. By Rev. Stat., cap. 111, a statute of distributions was passed very similar in its provisions to 26 Geo. 3, cap. 11, with the exception that section 17 was left out, and by Rev. Stat., cap. 162, the whole of 26 Geo. 3, cap. 11, was repealed. This statute was re-enacted by Consol. Stat., cap. 78, which now governs the distribution of intestate estates. Sec. 1 of cap. 78 declares "that when any person shall die intestate, his real estate shall be divided" as therein provided. Sec. 4, by which the distribution of the personal estate is governed, should have read into it at the beginning the same words, "When any person shall die intestate." If the section is read in this way, it is clear that the surplus personal estate of a wife goes to her next of kin, and not to her husband. That a wife is capable of dying intestate, is perfectly evident from 26 Geo. 3, cap. 11, sec. 17,

1890.

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In re  
CLEVELAND.

1890.

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*In re*  
CLEVELAND.

which uses the words "*estate of femes covert* who shall die intestate." It is fair to assume that the Legislature, when they passed 26 Geo. 3, cap. 11, considered it necessary to enact section 17 in order to take the husband, as administrator of the wife, out of the operation of section 14. Having afterwards repealed 26 Geo. 3, cap. 11, and enacted Rev. Stat., cap. 111, in its stead, from which all reference to the husband's rights reserved by section 17 of the former Act is omitted, it is equally fair to assume that the Legislature intended to alter the law, and place the husband as administrator upon the same footing as all other administrators. If the estates of *femes covert*, who die intestate, are not within the Consol. Stat. cap. 78, and are not intended to be dealt with by that Act, neither are the estates of *femes sole*. The words that will include the estates of *femes sole* must, of necessity, include the estates of married women dying intestate. The marital rights of the husband in the personal property in possession of the wife at the time of the marriage, which, it is admitted, existed at common law, are taken away by The Married Woman's Property Act, (Consol. Stat., cap. 72.) In 1851, previous to the repeal of 26 Geo. 3, cap 11, and the enactment of the Statute of Distributions — Rev. Stat., cap. 111 — which omitted all reference to the right of a husband in his deceased's wife's property, as provided for in the 17th section of 26 Geo. 3, cap. 11, the Married Woman's Act was passed and was re-enacted in Rev. Stat., cap. 114. By the latter act it was declared that "The real and personal property belonging to a married woman or accruing after marriage, except such as may be received from the husband while married, shall be owned as her separate property, so as to exempt it from seizure or responsibility in any way for the debts or liabilities of her husband." This act was afterwards repealed, and, as re-enacted by Consol. Stat., cap. 72, made stronger, by declaring that the wife's property should vest in her, and be owned by her as her separate property, thus making her the absolute and unqualified owner. The husband, in the face of this enactment, cannot claim by virtue of his marital rights the property in possession of the wife, which, by the common law, he was entitled to claim. The English Married Woman's Act, 1870, did not vest the prop-

erty in the wife, but simply provided that it should be deemed settled to her separate use. It is submitted, therefore, that reading Consol. Stat., cap. 78, which omits all reference to the special rights of the husband reserved by sec. 17 of 26 Geo. 3, cap. 11, together with Consol. Stat., cap. 72, which vests the wife's property in her absolutely, it is clear that the Legislature intended to take away any rights the husband had in the wife's property, marital or otherwise, and that it must be distributed to her next of kin.

1890.

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*In re*  
CLEVELAND.

*C. N. Skinner, Q. C., and W. Pugsley, S. G., contra.* Before the passing of the Act 22 & 23, Car. 2, cap. 10, the husband was entitled, *jure mariti*, to the personal property of his wife, and the right of the husband to the grant of administration of his wife's estate was claimed and affirmed on the ground that he was entitled to it, *jure mariti*. This right was recognized by statute 31 Edw. 3, cap. 11. See *Wms. on Exors.* 410, 1489. Irrespective, however, of any statute, the husband is entitled to the surplus of his wife's personal estate at her death; he is so entitled at common law, *jure mariti*, and no statute has cut down this right. After the passing of the Act 22 & 23, Car. 2, cap. 10, it was suggested that a doubt might arise as to whether or not a husband's rights were interfered with by the statute, and the declaratory Act, 29 Car. 2, cap. 3, sec. 25, was passed, not altering the former Act but explaining it and declaring that it should not be construed to extend to the estates of *femes covert* that died intestate. When the Act 26 Geo. 3, cap. 11, was passed in this Province, similar provisions to those contained in 22 & 23 Car. 2, cap. 10, and 29 Car. 2, cap. 11, sec. 25, were enacted. The including, however, of the provisions of sec. 25 was unnecessary, and did not add to or take away from the other provisions, as that section had been passed in England, as already stated, for the express purpose of better explaining, and as merely declaratory of, the provisions of 22 & 23 Car. 2, cap. 10. When, therefore, its provisions were omitted from Rev. Stat., cap. 111, the law was not altered, but re-enacted without any words explanatory of its meaning. The law as to the husband's rights was left as it was. Neither the 25th section of 29 Car. 2, cap. 3, nor the 17th section of 26

1890.

*In re*  
CLEVELAND.

Geo. 3, cap. 11, was necessary to protect the rights of the husband.

In the case of *Watt v. Watt* (1), the Lord Chancellor says: "He (meaning the husband) is entitled to the personal property of his wife, *jure mariti*: her personal property vests in him by the marriage. At the death of the wife, if it is necessary for him to have an administration to enable him to get in her personal property, the administration granted to him is granted to him as husband; and when you look at the statutes, there is no law that gives the husband a right by force of the statute to administer to his wife; *The husband's right is supposed in all statutes*. The statute 21 Hen. 8, cap. 5, which directs who shall have administration, takes no notice of the husband: they are to grant it to the widow or the next of kin, or both. That statute, therefore, does not take the widow to be the next of kin. It takes no notice of the widower, for the law gives it to him; and where it was necessary for him to have the authority of the Ecclesiastical Court to enable him to obtain her personal property, he had a right to it."

So, in our Statute of Distributions, the husband's right is *supposed*, and is neither affirmed nor taken away.

It has been argued that the words of Consol. Stat. cap. 78, sec. 1, "When any person shall die intestate," etc., show that it was the intention of the Legislature to make the mode of distribution of estates therein provided for apply equally to estates of *femes covert*. If this construction is to be given to the words, it must also apply to the real estate, and the husband's right as tenant by the curtesy would be taken away. But even if those words were read into section 4, as contended for, the law regards the husband as the next of kin, and the personal estate of the wife would go to him. See *Fortre v. Fortre* (2). As to the Married Woman's Property Act (Consol. Stat. cap. 72), the intention of the Legislature was not to interfere with the marital rights of the husband, but dealt with the property of the wife, vesting it in her during her lifetime, and exempting it from liability for the husband's debts. The marital rights of the husband, however, can only

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(1) 3 Ves. 244.

(2) 1 Show. 351.

be taken away by an express enactment. Secs. 29 and 30 of the Wills Act (Consol. Stat., cap. 77), enabling a married woman to make a will, show that it was not in the mind of the Legislature to denude the husband of his marital rights. If the Legislature intended that the husband should not have any rights in his wife's estate, it would not have prevented her making a will unless with her husband's consent. That reservation must have been made with a view to the protection of the husband's rights in the wife's estate.

1890.  
*In re*  
CLEVELAND.

*Wells*, in reply.

The authorities cited by the counsel are referred to in the judgment.

*Cur. adv. vult.*

The following judgments were now delivered:

TUCK, J. The question to be determined is, who shall take the surplus property, being separate, of the wife who dies intestate, without issue, leaving a husband, and brothers and sisters? Does the property go to the husband or the next of kin? The Judge of Probate for the County of Westmorland granted letters of administration to the husband of Sarah Jane Cleveland, and this is an appeal from his decision.

Before the Statute of Westminster 2 (13 Edw. 1, cap. 19), in case a person died intestate, the King, by the old law, was entitled to seize upon his goods, as *parens patriæ*, and general trustee of the Kingdom. For some time the King continued to exercise this prerogative by his own ministers of justice, and afterwards the Crown, in favor of the Church, invested the prelates with this branch of the prerogative, so that the Church took a deceased person's estate, without being required to pay even his lawful debts, or other charges thereon. Then it was enacted by the Statute of Westminster 2, that "the ordinary from thenceforth should be bound to answer the debts as far forth as the goods of the dead should extend in such sort as the executors of the same party should have been bounded if he had made a testament." In a note to Chitty's Statutes, it is said that this statute is in affirmance of the

1890. common law. Afterwards, 31 Edw. 3, cap. 11, was enacted,  
*In re* which provides "that in case when a man dieth intestate, the  
CLEVELAND. ordinaries shall depute the next and most lawful friends of the  
Tuck, J. dead person intestate to administer his goods, which deputies or  
administrators shall have an action to demand and recover, as  
executors have, the debts due the intestate, and shall account  
in the same manner." See 2 Black. Com. by Archbold, 494 and  
495.

It was contended by counsel for the next of kin, that the husband's right to administration of his deceased wife's estate was acquired by 31 Edw. 3, and that no such right existed at common law, and that being administrator he took the personal property of his deceased wife in his representative capacity, in the same manner as any other administrator takes personal property. On the other side, the contention is that the husband takes the property at common law by virtue of his marital right (*jure mariti*) and not because he is administrator. This question is attended with difficulty, seeing that the authorities are not at one on the point. In 1 Williams on Executors, it is said that this right (that is the right to be the administrator of his wife) belongs to the husband, exclusively of all other persons, and the ordinary has no power or election to grant it to any other. The writer continues: "The foundation of this claim has been variously stated. By some it is said to be derived from the statute of 31 Edw. 3, on the ground of the husband being the next and most lawful friend of his wife, while there are other authorities which insist that the husband is entitled at common law, *jure mariti*, and independently of the statutes. But the right, however founded, is now unquestionable, and is expressly confirmed by the statute 29 Car. 2, cap. 3, which enacts that the Statute of Distributions (22 & 23 Car. 2, cap. 10) "shall not extend to the estates of *femes covert*, that shall die intestate, but that their husbands may demand and have distribution of their rights, credits and other personal estates, and recover and enjoy the same as they might have done before the making of the said Act." In *Fortre v. Fortre*, (1), Sir John Holt says: "But where the wife dies, the husband is to have the administration, being the only true

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(1) 1 Show. 831.



and lawful next of kin by the statute of 31 Edw. 3, cap. 11." Again in *Rex v. Bettesworth* (1), it is said: "For though generally the husband is entitled to the administration as next of kin, yet that is in respect of the interest he has in the estate, and because nobody is in *æquali gradu*, and that is the reason why administrations are so often granted to a residuary legatee." In *Sir George Sands' case* (2), we have this report: "But where a *feme covert* died intestate, and the next of kin to her obtained administration, and the husband sued for a repeal, a prohibition was denied per Holt, Chief Justice, because in this case the ordinary had no power to grant it to any person, but to the husband; and that is not within the statute of Hen. 8, but within the statute of 31 Edw. 3."

Here it will be seen that administration, granted to the next of kin of a deceased wife, was repealed, and letters were granted to the husband, not on account of his being the next of kin, but because he bore such a relationship to the intestate as to bring him within the statute of 31 Edw. 3. According to this authority the husband's claim to the administration was derived from the statute, and he was not entitled at common law, *jure mariti*. The statute referred to by Chief Justice Holt in that case is 21 Hen. 8 cap. 5, which makes provision for granting administration to the widow of the person deceased, or the next of his kin. In the statute of 31 Edw. 3 the words used are: "the next and most lawful friends of the dead person;" in that of 21 Hen. 8 the words are: "to the widow of the same person deceased or the next of his kin." So that when in *Sir George Sands' case*, the Chief Justice holds that the husband's right to administration is derived from the statute of Edw. 3 and not from that of Hen. 8, he must mean that he takes as "the next and most lawful friend," under the statute. In *Fettiplace v. Gorges* (3), Lord Hardwicke says: "If she (that is the wife) makes no disposition, the husband succeeds as next of kin, not in consequence of the marital right." In a note to this case, Mr. Charles Sumner says: "It has been discussed in the books, by what title the husband surviving his wife takes her choses in action. It has often been said that he takes by the Statute of Distributions as her

1890.

*In re*  
CLEVELAND.

Tuck, J.

(1) 2 Stra. 1111.

(2) 3 Salk. 22.

(3) 1 Ves. 46.

1890.

In re  
CLEVELAND.Tuck, J.

next of kin. But from the language of the English Courts, it would seem to be more proper to say that he takes under the Statute of Distributions *as husband*, with a right in that capacity to administer for his own benefit; for in the ordinary sense neither the husband nor the wife can be said to be next of kin to the other." 2 Kent, 136 and 411.

Lord Loughborough, in *Watt v. Watt* (1), expresses an opinion contrary to that of Lord Hardwicke in *Fettiplace v. Georges*. He holds that the description of next of kin of the wife can in no sense apply to the husband; and says that "he is entitled to the personal property of his wife *jure mariti*: her personal property vests in him by marriage. At the death of the wife, if it is necessary for him to have an administration to enable him to get in her personal property, the administration granted to him is granted to him as husband; and when you look at the statutes, there is no law that gives the husband a right by force of the statute to administer to his wife. The husband's right is supposed in all the statutes. The statute 21 Hen. 8, cap. 5, which directs who shall have administration, takes no notice of the husband; they are to grant it to the widow or the next of kin, or both. That statute, therefore, does not take the widow to be the next of kin. It takes no notice of the widower, for the law gives it to him; and when it was necessary for him to have the authority of the Ecclesiastical Court to enable him to obtain her personal property, he had a right to it. The Statute of Frauds has a clause that the Statute of Distributions shall not prejudice the right of the husband, under an apprehension that his right might be considered to be affected by that Statute. The husband is not of kin to the wife, nor she to him. The Statute gives administration to the widow. She is not the next of kin, but takes as widow." See Co. Lit. 46, b. 351, and *Humphrey v. Bullen* (2). This appears to be a carefully considered opinion, directed particularly to the very point in question. If Lord Loughborough was correct in his view of the law, then there was only an apprehension that the Statute of Distribution, 22 & 23 Car. 2 cap. 10, affected the husband's right; and one may gather from his judgment

(1) 3 Ves. 244.

(2) 1 Atk. 458.

that he thought there was no ground for that apprehension, and that as this statute excludes the idea of the husband's taking under it as next of kin to his wife, his marital right, which vested his wife's personal property in him at marriage, was not prejudiced by the statute. In fact, if this decision gives a true interpretation of the statutes, and states correctly the husband's common law rights, it is nearly conclusive upon the question under consideration in the present case.

1890.  
In re  
CLEVELAND.  
Tuck, J.

In *Garrick v. Lord Camden* (1), the Lord Chancellor (Eldon), having in mind probably what had been said by Holt, C. J., in *Fortre v. Fortre*, and *Sir George Sands' case*, by Lee, C. J., in *The King v. Bettesworth*, and by Lord Hardwicke in *Fettiplace v. Gorges*, says: "Whatever may have dropt from judges, describing the husband as next of kin, or next legal friend of his wife, the tenor and bent of modern decisions go to this, that if the husband bequeaths to his next of kin, that *prima facie* does not include his wife; and it is quite clear that if a married woman, under a power of settlement, bequeaths to her next of kin, it would be impossible to hold that under the construction of such a will, without more, the husband would take as sole next of kin." That appears to be an authoritative statement of the law by a great lawyer, and I have been unable to find, among later authorities, any dictum even to the contrary.

In *Bailey v. Wright* (2), the Master of the Rolls (Sir William Grant) says: "In the cases where the husband has been spoken of as next of kin of his wife, the only thing in question was his right to administer; and that right has frequently been called his right as next of kin." He adds that in *Watt v. Watt*, and *Garrick v. Lord Camden*, it was determined that the husband did not at all answer to the description "next of kin," in a settlement or a will.

After the statute of 31 Edw. 3, which directs to whom the ordinary may commit the administration of the goods of an estate, came 22 & 23 Car. 2, cap. 10, which provides for the distribution of the estates of intestates. By the sixth section of this statute it is enacted, that "in case there be no children, nor any legal representative of them, then one moiety of the

(1) 14 Ves. 372.

(2) 18 Ves. 496.

1890.

*In re*  
CLEVELAND.

Tuck, J.

estate to be allotted to the wife of the intestate, the residue of the said estate to be distributed equally to every of the next of kindred of the intestate, who are in equal degree and those who legally represent them." And 29 Car. 2, cap. 3, known as the Statute of Frauds, by sec. 25 enact, that "for the explaining one Act of this present parliament, intituled 'An Act for the better settling of intestates estates,' be it declared that neither the said Act, nor anything therein contained, shall be construed to extend to the estates of *femes covert*, that shall die intestate but that their husbands may demand, and have administration of their rights, credits and other personal estates, and receive and enjoy the same, as they might have done before the making of the said Act."

26 Geo. 3, cap. 11, sec. 14, (Acts of Assembly) is the same in effect as secs. 5 and 6, cap. 10, 22 & 23 Car. 2; and sec. 17 of 26 Geo. 3, is the same as sec. 25 cap. 3, of 29 Car. 2. Cap. 11 is repealed by 1 Rev. Stat., cap. 162, and re-enacted by cap. 111, same book, except that sec. 17 of 26 Geo. 3 is left out. The distribution of personal property in this Province is now governed by Consol. Stat., cap. 78, sec. 4, which is substantially the same as 1 Rev. Stat., cap. 111.

A similar question came before the Court of Common Pleas in England in *Wilson v. Drake* (1). In that case administration was granted to the husband, and the question was whether he should be compelled to make distribution of her personal estate among her kindred or not? The argument is given in the report, but no judgment. It was argued on 26 Car. 2, and perhaps the passing of 29 Car. 2, cap. 3, rendered a judgment unnecessary.

The personal estate of a married woman dying intestate is not mentioned in Consol. Stat., cap. 78, sec. 4. Is such an estate necessarily included, although not expressly named? If it be answered that they are not included, then it is argued, that the same process of reasoning which excludes the estate of a married woman who died intestate, excludes also that of a widow or *feme sole*.

There is this important difference, however, between the married woman and the others. If a widow or a *feme sole* die

(1) 2 Mod. 20.

intestate, no principle of the common law is violated when her property is distributed amongst her next of kindred, in accordance with the Statute. But if the wife is to be deemed an intestate within the Act, then all of her choses in action must be distributed amongst her next of kin, and her husband will be, by implication, not by the express words of the statute, deprived altogether of the property which he would otherwise have. It is clear, if the appellant is right in his contention, that the husband takes nothing in the distribution. Then this extraordinary result must follow, that if a husband die, leaving no children, nor any legal representatives of them, his widow will take one moiety of the surplusage of his personal estate, but if a wife die under like circumstances the widower takes nothing. Or again, if it is allowable to interpret this section so as to make it apply to the intestate estates of married women, then why not also construe it so as to read when the circumstances make it necessary, "one moiety of such surplusage shall be allowed to the widower;" that is, substitute "widower" for "widow." I think there is as much warrant for the one as the other. Look at the section still further. It provides that "if there be no widow all such surplus shall be distributed equally amongst the children; and if no child, to the next of kindred in equal degree of the intestate, and their representatives." In the ordinary meaning of language, if that is the proper canon of construction, "intestate" here must mean "husband." Without doing violence to every rule, widower can hardly be substituted for widow in this clause.

Then there is the last part of the section: "If after the death of the father, any of his children shall die intestate, without wife or children, in the lifetime of the mother, every brother and sister, and their representatives, shall have equal share with her." Surely there is no authority for so changing the language of this clause, as to make it fit the case of a married woman dying intestate leaving choses in action and other personal property. In such a case "mother" would have to be inserted, where "father" is, and *vice versa*. It is clear to my mind that when the legislature passed this section, it had not in contemplation the personal estate of a married woman at all. It never entered into the mind of the legislature, that a

1890.

*In re*  
CLEVELAND.

Tuck, J.

1890.

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*In re*  
CLEVELAND.

---

Tuck, J.  

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married woman could die possessed of any personal property, and therefore no provision was made for such a case. The only married person intended by this section is the married man, no provision is made for the estate of *femes covert*, they must continue to be disposed of as at common law.

If the legislature had intended to alter the rights of husbands as to the estates of their deceased wives, it would have done so in clear and unmistakable language, and would not have left the matter in doubt, and to be gathered merely by implication.

The construction for which the appellant contends, is inconsistent with the principle that a wife's personal property vests in the husband by marriage; a legal principle, which there is no apparent intention on the part of the legislature to disturb. It seems not unreasonable to suppose that no provision is made for the widower, because the law gives him the intestate estate of his deceased wife.

From a careful examination of the authorities, and on principle, I am of opinion that the husband is entitled to the personal property of his wife *jure mariti*; her personal property vests in him by the marriage. At the death of his wife, he is entitled to administration of her estate as husband, and not by force of the statute as next of kin. The husband is not of kin to the wife, nor she to him. In his note to *Fittiplace v. Gorges*, Mr. Sumner, it seems to me, has stated the law in this respect correctly.

*Milne v. Gilbert* (1) has some bearing on the question. It was twice argued, first before Lord Cranworth and Lord Justice Knight-Bruce, and afterwards before Lord Justices Turner and Knight-Bruce. It is held by both Courts, that under a bequest (in the event of daughters dying without leaving issue) for the persons, who would at the time of decease of such daughters respectively, be entitled as next of kin or otherwise to the personal estate of such daughters respectively, under the statutes made for the distribution of intestates effects, that the husbands of the daughters did not take. Lord Cranworth in the course of his judgment says: "Now I take it to be quite clear, that in order to come within

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(1) 2 DeG., M. & G. 715; 5 Id. 510.

the express words here (that is of the will), the husband must show he is a person entitled under some or one of the statutes made for the distribution of the intestate's effects. In my opinion the husband is not so entitled at all. He is entitled by a right paramount. It may be that he is entitled to administer under the statute of Edward, but this is a different right. The Statute of Distributions of 22 & 23 Car. 2 is in terms so worded, that it might have included the husband, not so as to give him a right, but to take away a right from him. That difficulty afterwards having been contemplated, a declaratory clause was introduced into the Statute of Frauds, to say that the Statute of Distributions was not intended to have any such effect. The effect of the clause thus introduced, was to leave the husband just in the condition he was before the passing of the Statute of Distributions; namely, with a right to appropriate the property to himself, a right which belonged to him independently of any statute. He has the same right now."

Lord Justice Knight-Bruce says: "That it may fairly, and probably with correctness, be contended that the husband's right is not under any Statute of Distributions, inasmuch as the Statute of 29 Car. 2, in so many words, gave or restored to him, by way of declaratory enactment, the right which he would have had if the Statute of the 22 & 23 Car. 2 had not passed." Lord Justice Turner says: "The Statute of Distributions particularly excludes the idea of the husband taking under it. The difficulty which arose under the Statute of Distributions, and which was disposed of by the Statute of Frauds, was not whether the husband took any right under the Statute of Distributions, but whether that statute had not taken away the common law right of the husband. It was said, however, that in the earlier authorities upon this subject, an interpretation has been put upon the words "next of kin," as used in the statute as entitling the husband; or at least that he was so treated in the earlier cases. With reference to this argument, it is sufficient to refer to Lord Eldon's observations in *Garrick v. Lord Camden*." He quotes what Lord Eldon says and concludes with this sentence: "Whatever may be the *dicta* in favor of the husband, occurring in the earlier cases upon the

1890.

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*In re* -  
CLEVELAND.

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Tuck, J.

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1890.

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*In re*  
CLEVELAND.

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Tuck, J.

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subject, it appears to me that the course of the modern law upon the subject leads to a different conclusion."

With the view I entertain as to the proper construction of Consol. Stat., cap. 78, sec. 4, the observations of the judges in *Milne v. Gilbert*, confirm my judgment as to the other points to which I have already referred. At the argument, reference was made to the Married Woman's Property Act, and its effect upon her separate property after death. In recent cases, it has been held that the quality of separate property ceases on the death of the married woman, and that thereupon her separate property devolves just as if the separate use had never existed.

In *Cooper v. McDonald* (1), Sir G. Jessel, M. R., says: "The separate use, if I may say so, is exhausted when the wife has died without making a disposition." And Stirling, J., in *In re Lambert's Estate* (2), says: "So far as the property is undisposed of, the quality of separate property ceases on the wife's death; and consequently the right of the husband accrues just as if the separate use had never existed."

For these reasons I have come, although reluctantly, to the conclusion, that this appeal must be dismissed; but as the question involved comes now for the first time before the Court, is one of importance, and proper to be submitted for judicial decision, the next of kin should have their costs out of the estate. If I have correctly interpreted sec. 4, of the Statute of Distributions, then it is high time that a change were made in the law. As it is now, a married woman is prevented from making a will without the consent of her husband; and dying intestate, her choses in action go to him. No evil, in my judgment, would result, if a married woman were permitted to make a will without such consent. There can be little doubt, that, in the large majority of instances, if a husband is kind and affectionate, he is the person to whom his wife would leave her separate property. As the law now stands, a husband, who is worthless, reckless and undeserving, may take the undisposed of personal estate of his wife, at her death, while some worthy and deserving sister is left wholly unprovided for. The legislature should step in and remedy the evil.



KING J. The sole question here is, whether the surplus separate property of a wife, dying intestate, should go to her husband or to her brothers and sisters. The Judge of Probate of Westmorland decided in favor of the husband, and this is an appeal from that decision, in which Mr. *Wells* appeared for the next of kin, and the *Solicitor-General* and Mr. *Skinner* for the husband.

1890.

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In re  
CLEVELAND.

It is well settled that the right belongs to the husband, exclusive of all other persons, to be the administrator of his wife. Williams on Executors, 410:—“The foundation of this claim,” says Williams, “has been variously stated. By some it is said to be derived from the statute 31 Edward 3, on the ground of the husband being the next and most lawful friend of his wife. While there are other authorities which insist that the husband is entitled at common law *jure mariti*, and independently of the statutes.” And in a note it is added:—“Others have supposed that the husband is entitled as next of kin to his wife, *Fortre v. Fortre* (1), but it seems clear that the husband is not of kin to his wife at all, *Watt v. Watt* (2); but the right, however founded, is now unquestionable, and is expressly confirmed by the Statute 29 Car. 2.”

At common law the right to administration carried with it the right to the exclusive enjoyment of the residue of the personal property after payment of the debts. This was the general law applicable to all administrators, and the husband, whether because he was the administrator or because of the *iure mariti*, which gave to him the exclusive right of administration, had at common law the right to the exclusive enjoyment of the residue of the personal estate of his wife after the payment of her debts.

But as in many cases there might be a number of persons standing in like relation to the deceased, each of whom would have equal claim to the administration, and consequently to the enjoyment of the estate, and as in such case the operation of the principles of law which gave the whole to the administrator worked hardship and injustice, the Statute of Distributions was passed. This was the Statute of Distribution of intestates' effects, passed in 22 & 23 Car. 2.

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(1) 1 Show. 351.

(2) 3 Ves. 244.

1890.

*In re*  
CLEVELAND.

King, J.

A doubt then arose, whether under this statute the husband's right was not superseded by the force of the statute, and whether he was not bound to distribute the personal estate of his wife amongst her next of kin. Mr. *Wells* has pointed out the case in which the question was raised and determined. It is *Wilson v. Drake* (1). It arose in the 26 & 27 Car. 2. Then a Declaratory Act was passed in 29 Car. 2. It is the 25th section of the Statute of Frauds, and reads as follows: "And for the explaining an Act of this present Parliament, intituled 'An Act for the better settling of Intestate's Estates,' be it declared that neither the said Act, nor anything therein contained, shall be construed to extend to the estates of *femes covert* that shall die intestate, but that their husbands may demand and have administration of their rights, credits and estates, and recover and enjoy the same, as they might have done before the making of the said Act."

In *Milne v. Gilbert* (2), Turner, L. J., speaking of the said Act says: "The difficulty which arose under the Statute of Distributions, and which was disposed of by the Statute of Frauds, was not whether the husband had any right under the Statute of Distributions, but whether that statute had not taken away the common law right of the husband."

Lord Cranworth, in a former hearing of the same case (3), says: "The Statute of Distributions is in terms so worded that it might have included the husband, not so as to give him a right, but to take away a right from him. That difficulty having afterwards been contemplated, a declaratory clause was introduced into the Statute of Frauds to say that the Statute of Distributions should not have that effect. That clause was introduced to place the husband just in the predicament in which he was before the passing of the statute, namely, entitled to appropriate the property to himself, but quite independent of any statute at all."

In the case of *Stanton v. Lambert* (4), a question arose as to the effect of the English Married Women's Property Act of 1882, upon the rights of the husband upon the decease of his wife, and it was held that the Act did not affect the devolution of property, and that upon the death of a married

(1) 2 Mod. 20.  
(2) 23 L. J. Eq. 828.

(3) 23 L. J. Eq. 832 n.  
(4) 39 Ch. D. 626.

woman her property lost the character of separateness that it had before. The Court says: "So far as the property is undisposed of, the quality of separate property ceases on the wife's death, and consequently the right of the husband accrues, just as if the separate use had never existed. If the undisposed of property consists of *choses in action*, the equitable interest of the husband vests on the death of the wife."

1890.  


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*In re*  
 CLEVELAND.  


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 King, J.  


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Of course, such *choses in action* could be recovered only by the legal personal representative of the wife, but the husband when living is absolutely entitled to be constituted such legal personal representative.

Such being the history of the law in England, let us look at the state of the statute law in this Province. By 26 Geo. 3, cap. 11, sec. 14, similar provision for the distribution of intestates' effects was made, as was made by the 22 & 23 Car. 2, and by the 17th section it was declared that "nothing in this Act contained shall be construed to extend to the estates of *femes covert*, who shall die intestate, but that their husbands may demand, and have administration of their rights, credits and other personal estates, and recover and enjoy the same as they might have done heretofore."

This was the state of the statute law when the Revised Statutes were passed in 1854. In the revision then made the second section of cap. 111 was a substantial re-enactment of sec. 14 of 26 Geo. 3, cap. 11, with some alterations of phraseology, but there was no provision corresponding to sec. 17 of 26 Geo. 3, cap. 11, and the 26 Geo. 3, cap. 11, was wholly repealed.

Cap. 111 of the Revised Statutes is (so far as it bears on the point in question) substantially re-enacted by the Consol. Stat., cap. 78. Section 1 relates to the division of the real estate of intestates, and begins thus:—"When any person shall die intestate, his real estate shall be divided," etc. Secs. 4 and 5 relate to the distribution of personal property. Sec. 4 begins thus:—"The surplusage of the personal estate shall be distributed by the Judge of Probate in manner following."

It was contended, and apparently with reason, by Mr. Wells, that the words at the beginning of section 1, "When any person shall die intestate," are to be considered as if repeated at

1890.

*In re*  
CLEVELAND.

King, J.

the beginning of sec. 4, although such construction rests upon implication.

The portion of sec. 4 bearing upon the present case is as follows: — "If there be no children, nor any legal representatives of them, one moiety of such surplusage shall be allowed to the widow, and the residue be distributed equally amongst the next of kindred of the intestate in equal degree, and those who legally represent them, \* \* \* and if there be no widow, all such surplusage shall be distributed equally amongst the children; and if no child, to the next of kindred in equal degree, of the intestate and their representatives."

The learned *Solicitor-General* argued that under this section the husband may be deemed the next of kindred to his wife, citing *Fortre v. Fortre* (1); but *Watt v. Watt* (2), *Garrick v. Lord Camden* (3), and *Milne v. Gilbert* (4), are conclusively to the contrary. In the latter case Turner, L. J., says: — "It has been said that in the earlier cases upon the subject an interpretation has been put upon the words 'next of kin,' as used in the statute, as entitling the husband; or, at least, that he was so treated in the earlier cases. That, however, is sufficiently answered by Lord Eldon in *Garrick v. Lord Camden* (3) where he says: 'Whatever may have dropped from Judges describing the husband as next of kin, or next legal friend of his wife, the tenor and bent of modern decisions go to this; that if a husband bequeaths to his next of kin, that *prima facie* does not include his wife; and it is quite clear, that if a married woman under a power by settlement bequeaths to her next of kin, it would be impossible to hold, that under the construction of such a will without more, the husband would take, as sole next of kin.' Whatever may be the dicta in favor of the husband, occurring in the earlier cases upon the subject, it appears to me that the whole course of modern law upon the subject leads to a different conclusion."

Before considering the construction to be placed on our statute, and whether or not it extends to take away the right of the husband, it may be convenient to refer more at length to a few cases upon the nature of the husband's right. Lord Hardwicke, in *Humphrey v. Bullen* (5), says: "During the coverture

(1) 1 Show. 351.  
(2) 3 Ves. 244.

(3) 14 Ves. 372.  
(4) 23 L. J. Eq. 828.

(5) 1 Atk. 458.

1890.

*In re*  
CLEVELAND.King, J.

they are but one person ; but when that is dissolved by the death of the wife, the husband is certainly the next friend and nearest relation, and has a right to administer exclusive of all other persons. At common law no person at all had a right to administer, but it was in the breast of the ordinary to grant it to whom he pleased, till the statute of 21 Hen. 8, which gave it to the next of kin ; and if there were persons of equal kin, whichever took out administration was entitled to the surplus ; and for this reason the Statute of Distributions was made, in order to prevent this injustice, and to oblige the administrator to distribute. The husband is not within the equity of the statute, and it is explained besides by the last clause of the Statute of Frauds." In *Watt v. Watt* (1), Lord Loughborough says : "The description of the next of kin of the wife can in no respect apply to the husband. He is entitled to the personal property of his wife *jure mariti*. Her personal property vests in him by the marriage. At the death of his wife, if it is necessary for him to have an administration to enable him to get in her personal property, the administration granted to him is granted to him as husband ; and when you look at the statute, there is no law that gives the husband the right, by force of the statute to administer to his wife ; the husband's right is supposed in all the statutes. The statute 21 Hen. 8, cap. 5, which directs who shall have administration, takes no notice of the husband ; they are to grant it to the widow or the next of kin. It takes no notice of the widower ; for the law gives it to him ; and where it was necessary for him to have the authority of the ecclesiastical Court to enable him to obtain her personal property, he had a right to do it." The Statute of Frauds has a clause that the Statute of Distributions shall not prejudice the right of the husband, under an apprehension that his right might be considered to be affected by that statute.

In *Ognell's Case* (2), it is said : "The administration of a husband to the goods of his wife is grounded upon this reason, because the marriage is *quasi* a gift to him in law."

In Kent's Commentaries, 2 volume, page 124, it is said : "Under the statute it is held that the husband is entitled for

(1) 3 Ves. 244.

(2) 4 Coke 51.

1890.

In re  
CLEVELAND.King, J.

his benefit *jure mariti* to administer, and to take all her chattels real, things in action, and every other species of personal property whether reduced to possession or contingent or recoverable only at suit." And Blackstone, 2 volume, 515, says: "The right of the husband at Common Law was not only to administer, but to enjoy exclusively the effects of his deceased wife."

Such being the right of the husband, and such being his right at the time of the passing of the Revised Statutes, and this right not be taken away in terms by our Statute of Distributions, is it taken away impliedly?

It is a rule of construction that general and affirmative words do not take away a particular right or exemption. In *Mansfield v. Mansfield* (1), Bowen L. J., referring to a decision of his own, in *Reid v. Reid* (2), says: "The decision which seems to me to be a correct decision went on the principle that in the construction of statutes you must not construe the words so as to take away rights which already existed before the statute was passed, unless you have plain words which indicate that such was the intention of the Legislature."

Now, applying that rule here, it is clear in the first place (at all events with regard to persons who were married before the revision in 1854), that husbands had rights of property which existed before the statute was passed. Those rights were held under the common law according to the authorities cited, or at least under the statute of 31 Edward 3; but whatever the foundation of it, they were existing rights in the husband in the event of his wife's death to her chattels real, things in action and every other species of property whether reduced to possession, or contingent or recoverable only by suit. The marriage as expressed in 4 Coke 57 was "*quasi* a gift to him in law."

Then, this right thus existing at the passage of the Revised Statutes, the next question is:—Has the Legislature indicated by plain words that it intended to take the right away?

Can it be contended that the Legislature has by plain words taken the right away, in view of the doubts that arose upon the earlier statute of 22 & 23 Car. 2, and in view of the

(1) 43 Ch. D. 17.

(2) 31 Ch. D. 402.

declaratory legislation to the contrary, and in view of the expressions of the Courts from time to time?

1890.

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*In re*  
 CLEVELAND.

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 King, J.
 

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Thus, Lord Cranworth says of the Statute of Distributions in language already quoted: "That it might have included the husband," — (He does not say it would) — "not so as to give him a right, but take away a right from him." We have also seen Lord Hardwicke saying that "the husband is not in the equity of the statute," and the opinion of Lord Loughborough in *Watt v. Watt* as already cited is clear that, "independent of the statute the husband has the right to obtain the wife's personal property," and that "the husband's right is supposed in all the statutes;" and he refers to the Declaratory Act as having been passed under an apprehension that the husband's right might be considered to be affected by the Statute of Distributions, which apparently indicates his opinion as to the right of the husband, notwithstanding the Statute of Distributions. All this shows that the language of the Statute of Distributions was considered as at least doubtful.

With regard to the arguments in *Wilson v. Drake* (1), there are some arguments advanced in favor of the husband which seem fanciful, and others which would not be applicable under our statutes.

Still, whatever may be said of the weight of the several arguments on one side or the other, I think it impossible to say, in view of the historical aspects of the matter, that the words of our Statute of Distributions plainly take away the husband's right.

I make two or three more observations. If the provisions in question, as to the distribution of personal property, extend to the case of *femes covert* so as to take away the husband's rights *jure mariti*, then in a like manner (and even more strongly because the words of the first section extend in terms to the case of all persons dying intestate, while the said words have to be implied in the case of the distribution of personal property), the provisions of the first section relating to the distribution of real estate extend to take away the husband's right or estate of tenancy by curtesy. Can this be said to be done

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 (1) 2 Mod. 20.

1890.

In re  
CLEVELAND.King, J.

by the first section? In *Pourrier v. Raymond* (1), the husband's right is declared.

In the next place, the references to the right of the widow, and to all possible contingencies that may arise, and the entire absence of any reference to the co-relative relation of the widower, lead to the conclusion that the common law rights of the husband in respect of the property of his wife, were not being dealt with at all by the statute. To illustrate it again, by reference to the first section regarding the distribution of real estate, that section saves or acknowledges the widow's right of dower, while no reference is made to the husband's tenancy by curtesy. As this would seem to indicate that the Legislature was not dealing or interfering with the rights of the husband, so it may be said that in the case of the distribution of personal property the studied silence with regard to the well known rights of the husband may seem to show that the Legislature was not interfering with or dealing with such rights. In view of the rights of the parties, and the historical aspect of the question, can we suppose that the Legislature would alter the law simply by reverting to the language which was known to be doubtful?

As to the contention by Mr. *Wells*, that there is no more reason for excluding the estates of *femes covert* than the estates of unmarried females, I would say that the latter may very well be brought within the general words of the Act, because the inclusion of such cases in the general terms of the Act would not interfere with any known class of existing rights. The reason herein given for excluding the estates of *femes covert* is inapplicable to the case of unmarried females. For these reasons, I think the husband's right still exists. It did not need the statute to give it, and the statute has not taken it away.

Mr. *Wells* argued that the Married Women's Property Act deals with the matter of her separate property in a way to deprive the husband of all rights whatever, even after her death. I think this is not so, and that the observations of the Court, in *Re Lambert* (2), are entirely applicable. In my opinion, therefore, the appeal should be dismissed. The case has been ably argued on both sides. Costs of both parties should be

(1) 1 Han. 512.

(2) 39 Ch. D. 623.



paid out of the estate. The appeal was eminently proper to be brought.

1890.

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*In re*  
 CLEVELAND.

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 King, J.
 

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PALMER J. The sole question in this case is, whether, when a wife dies, the personal property she had at the time of her marriage, or that she acquired after marriage, otherwise than from her husband, goes to her relations or to her surviving husband.

At common law, chattels personal belonging to a wife in her own right, which she is beneficially possessed of at the date of the contract, are absolutely bestowed upon the husband: so absolutely that such property can never revert to the wife, and the representatives of a married woman could not acquire any legal right to them, and a married woman could not acquire any legal right to property during her coverture, and if she had any money or goods in her possession, and she loaned the one or sold the other, the right to recover the debt, or the value of the property thus parted with, vested in the husband.

The right which the wife had to chattels personal outstanding, or choses in action, was not divested by the marriage, but it was liable to be so divested by an act done in the married state, that is, by the husband reducing them into possession; and in this way only could he divest her right of property. See *Gaters v. Madeley* (1), *Sherrington v. Yates* (2), and *Prole v. Seady* (3); so that even at common law this portion of the wife's personal property would not pass to the husband on her death, but would go to her administrator, whom the common law authorized the ordinary to appoint, and who held them entirely for his own use.

Looking at these well settled principles of law, it is perfectly evident that any right which either the husband or next of kin can have in such property, must be by virtue of some statute law; it is not by the husband's marital rights at common law, and the next of kin had no rights at common law.

The first trace I can find in the English law of the husband's right to such property, or indeed any property that was vested in the wife at the time of her death, is what was created by the statute of 31 Edw. 3, which in effect declared that the

(1) 6 M. &amp; W. 423.

(2) 12 M. &amp; W. 855.

(3) L. R. 3 Ch. 220.

1890.

In re  
CLEVELAND.Palmer, J.

ordinary should thereafter be bound to grant administration to the next and lawful friends of the intestate, and not, as before, to such a person as he chose; and the courts decided that the husband was the next and lawful friend of his deceased wife, and it followed that he was entitled to have administration granted to him, and upon that being done the law vested in him the property with no accountability for it. It followed that the husband's right in the first kind of property vested in him at the time of the marriage by virtue thereof; the latter kind he did not so acquire, but acquired as the administrator of his wife. The first was his from the date of the contract, the latter from the death of his wife as her administrator. In this state of the law the first Statute of Distributions, 22 & 23 Car. 2, cap. 10, was passed in England, which for the first time took away the beneficial right of an administrator in the assets that came into his hands as such, and directed him to distribute the surplus of it, after paying debts and other charges upon it, among the next of kindred of the intestate, and it is apparent, if I am right, that the husband's right to it was solely as administrator, and as that statute directed him to distribute the surplus among the next of kin, he would have been compelled to do so, and his beneficial right gone unless he could make it out that he was the next of kin himself. And we accordingly find that shortly after the passing of that statute the question came up and was debated in the case of *Wilson v. Drake* (1), in which there does not appear to have been any decision; for while the case was under consideration, a section was inserted in the Statute of Frauds, 29 Car. 2, cap. 3, enacting that nothing in the Statute of Distributions contained should be construed to extend to the estate of *femes covert* who died intestate, but that their husbands might demand and have administration of their rights, credits and other personal estates, and enjoy the same as they might theretofore; and this enactment in the same terms has been continued in the Statute of Distributions in England to this day.

It will be observed that Parliament, in this section, speaks of the estates of *femes covert*, and that their husbands could demand administration of such estates. How could there be a more,

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(1) 2 Mod. 20.

certain legislative declaration that *femes covert* could have estates that required the appointment of administrators to administer them, and that such administrator would have such estate as such administrator; and if a Statute of Distributions, such as ours, was then passed declaring that all administrators should distribute the surplus of the estate in their hands, as such, among the next of kin, there would be no way for any administrator, be he husband or not, to escape doing so except by being excepted out of the operation of such statute. It appears to me that is the case with this husband; for, by the very decree appealed from, it is determined that he has a surplus of this woman's estate in his hands to be administered. It may well be, that before the passing of the Statute of Distributions, and more especially after a clause was enacted in a subsequent statute, not only that it should not apply to the estates of the *femes covert*, but also that the husband might demand administration of such estates, that there would be created an equity in the husband to have the surplus, which might be enforced even if administration was improperly granted to any other; but if so this could only be by virtue of being so excepted, and his right to the administration.

Under such a statute (which distinctly declared that nothing in the Statute of Distributions should extend to the estates of *femes covert*, it is clear that there would be nothing to interfere with the husband's right acquired under the statute of 31 Edw. 3, which I have before referred to. This matter would appear to be abundantly plain if it were not for the *dicta* of several eminent Judges dealing sometimes with matters of the right to the property, who in some respects have confused a matter that would appear to be on the surface very plain and well settled. What I allude to is, that we find Lord Thurlow, as early as 1789, in *Fettiplace v. Gorges* (1), saying that the husband succeeds as next of kin, and not in consequence of his marital right.

This, while perfectly correct that he does not succeed by virtue of his marital right, but by reason of his being her husband, under the statute of 31 Edw. 3, yet is erroneous, for he is not next of kin. In that, the learned Lord Chancellor was

1890.

In re  
CLEVELAND.

Palmer, J.

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(1) 1 Ves. 46.

1890.

In re  
CLEVELAND.Palmer, J.

clearly wrong; although the same notion is put forward by the Court of King's Bench in *Fortre v. Fortre* (1), and same case *Fawtry v. Fawtry* (2), so long ago as 33 Car. 2, and afterwards by the same Court in 12 Geo. 2, in the case of *Rex v. Bettsworth* (3). But nothing is clearer than that the husband is not next of kin to his wife at all, nor the wife to the husband. The whole frame of the Statute of Distributions is based upon that idea. For whatever is given to the wife, is given as wife, and not as kindred. This was first decided in the case of *Watt v. Watt* (4), which has been followed by numberless decisions and *dicta* since. Therefore, it is clear that with reference to the wife's choses in action, not reduced into possession, the husband can only claim as administrator by virtue of the statute of Edward, and must further claim that that has not been affected by the Statute of Distributions.

There was another principle introduced into the practical administration of the law — a doctrine of the deepest importance, which has been established by the Court of Chancery to enable a married woman to enjoy her property independently of her husband — and the effect was to protect her from the consequences of her husband's improvidence, dishonesty or misconduct; and for this purpose, what was called the holding of property for the separate use of the wife was devised, and it is easy to see that this could have no effect upon the property after the death of the wife, for whose benefit and protection it was intended. Such separate use could only exist in the married state, and it ceased on the dissolution of the marriage by the death of the wife, and therefore the legal rights of the husband were not encroached upon after the coverture ceased; and by consequence his position with reference to her property, whether real or personal, was the same as if it was never settled to her separate use.

This is sufficiently plain by reference to the cases, and is of great consequence as a key to the construction of the Married Woman's Property Act, which was afterwards passed. At all events, this was the state of the law in England until it was altered by what is called the Married Woman's

(1) 1 Show. 351.  
(2) 1 Salk. 38.

(3) 2 Stra. 1111.  
(4) 3 Ves. 244.

Property Act in 1870, the principal provisions of which were:—

1890.

*In re*  
CLEVELAND.

Palmer, J.

Sec. 1. That the earnings of a married woman, acquired in any trade, etc., carried on separate from her husband, were to be deemed settled to her separate use and independent of her husband's control.

Secs. 2, 3 and 4. Deposits in savings banks, property in funds, stock or shares in an incorporated company or a joint stock company, shares in a friendly society or benefit society, might be held by a married woman for her separate use.

Sec. 7. Any married woman, since the passing of the Act, coming into any personal property through an intestate, or any sum of money not exceeding £200, under deed or will, shall hold such property to her separate use.

Sec. 8. The rights of any freehold, copyhold or customary-hold which shall descend to a married woman after the passing of the Act shall be for her separate use.

Sec. 11. A married woman may sue in her own name, as if a *feme sole*, for any wages, etc., declared her separate property, or for property belonging to her before marriage which her husband had agreed should be hers after marriage for her separate property, or for chattels, etc., purchased out of her separate property.

As it appears to be carefully drawn so' as not to vest this property absolutely in the wife, but only that it should be held or settled to her separate use, which was a condition well known to the law as administered in the Court of Chancery, it would follow that in construing the Act the Courts would decide that property so held, would be just the same as though it had been settled to the separate use of the wife.

After this, however, the Married Women's Property Act of 1882 was passed in England, the important provision of which was that a married woman should, in accordance with the provisions of the Act, be capable of acquiring and holding, by will or otherwise, any real or personal property as her separate property, in the same manner as if she was a *feme sole*, without the intervention of any trustee. After which it would appear to be of more doubtful construction, whether the husband could

1890.

*In re*  
CLEVELAND.Palmer, J.

consistent with the language there used, have any interest remaining in such property, either by virtue of his common law marital rights, or by virtue of the statute of Edward, or by being excepted out of the Statute of Distributions and be given the right to the administration, and the only decision that has been given upon these questions was an opinion given by Stirling, J., sitting in the Chancery Division in *Stanton v. Lambert* (1); in which he decides that that did not prevent her undisposed property devolving upon the husband at her death, according to the decisions of *Proudley v. Fielder* (2); *Molony v. Kennedy* (3); *Cooper v. McDonald* (4.) In the course of his judgment he says: "That Act simply confers upon a married woman the capacity to acquire, to hold and dispose of, by will or otherwise, property the same as if a *feme sole*. None of these are questions, etc., as respects the devolution of property, and with these this Act does not purport to deal."

It is apparent that this reasoning shews that he considers that the wife owned the property at the time of her death; and if so, it is clear that as the statute to which I have referred, is not interfered with by the Statute of Distributions, as it is apparent that it has not been in England, no other conclusion could be arrived at. But it is important as showing that even under the words of the English Statute, that learned Judge did not think that such property was the husband's by virtue of his marital right, because in that case there would be no devolution of property; it would have passed to the husband at the time of the marriage contract, subject, of course, to the use and disposition of the wife during her life; shewing clearly that that learned Judge thought that his right to the property was by the devolution of it from the wife to the husband by the death of the wife, and not by reason of any property that would pass to him at common law as her husband.

This brings me to the condition of things in this Province. On its first constitution, the husband's rights by virtue of the statute of Edward existed here, and the first Statute of Distributions was 26 Geo. 3, cap. 11, the 17 sec. of which enacted that, "Nothing in the Act should be construed to extend to the estates of *femes covert* who died intestate, but that their hus-

(1) 29 Ch. D. 626.  
(2) 2 Myl. & K. 57.

(3) 10 Sim. 254.  
(4) 7 Ch. D. 223.

bands might administer them, &c., as they might have done heretofore." This state of the law was continued, I believe, down to the time of the passing of the Revised Statutes in 1854, when the statute was substantially re-enacted and the old Act repealed, but the 17th sec. referred to was repealed and not re-enacted. Previous to which time, however, what was called the Married Women's Property Act was passed, which was re-enacted in cap. 114 of the Revised Statutes, the first section of which was as follows: "The real and personal property belonging to a woman before, or accruing after her marriage, except such as may be received from the husband while married, shall be owned as her separate property so as to exempt it from seizure or responsibility in any way for the debts or liabilities of her husband." This was afterwards repealed and by Consol. Stat., cap. 72, it was enacted: "That the real and personal property belonging to a woman before, or accruing after marriage, except such as may be received from her husband while married, shall vest in her and be owned by her as her separate property, and it shall be exempt from seizure or responsibility in any way for the debts or liabilities of her husband, and it shall not be conveyed, encumbered or disposed of during the time she lives with her husband, without her consent." And the question now is, whether the husband in such case can have any property by virtue of his marital rights, or whether he must claim it, if he has any claim at all, by virtue of his being administrator, or whether the property, if any, must devolve upon him upon the death of his wife and through her.

It will be observed that there are no words in this Act, by which the wife is to have any separate use of the property, but whereas the law before was that that property would vest in and be owned by the husband, subject it might be to her separate use, and such property did not vest in the wife nor was it owned by her. Now the plain words of the statute says that it shall vest in her and be owned by her, not to her separate use, but as her separate property.

I think if I give those words their plain meaning it is impossible for any person, be he husband or not, to have any right or property in what is so to vest in and be owned by the wife

1890.

In re  
CLEVELAND.

Palmer, J.

1890.

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*In re*  
CLEVELAND.

---

Palmer, J.

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as her separate property. If I could, it is clear that the husband could have no right in that part of the personal estate of the wife that consisted of choses in action, other than as administrator, founded on the statute of Edward. I admit (*quoad* all her property except the choses in action) that the view I have is founded entirely upon the construction of the statute relating to the property of married women to which I have referred.

In construing that statute I must apply the rules that ought to be applied to the construction of all statutes, indeed of all writings. One rule enunciated by the House of Lords in 2 Dow & Clarke 489, was that where the language of an Act is clear and explicit, the Court must give effect to it whatever the consequence; and in that case it was said that the words of the statute speak the intention of the Legislature. In other words, if the words used by the Legislature are precise and unambiguous, a court of law at the present day has only to expound the words in their natural and ordinary meaning.

I do not think that Courts are warranted in surmising from extraneous circumstances the words or language the Legislature intended to use, and to decide that they did not use the language they intended to, but used inappropriate and wrong language. The Court must assume that the Legislature used just the language that they intended to, and that they meant the law to be just what the fair meaning of that language would show they intended.

It follows that, in my opinion, both the property belonging to the wife before marriage, or accruing after her marriage, except that received from her husband, as well as her choses in action not reduced into possession by her husband, were the separate property of the wife, and were vested in and owned by her at the time of her death; and, in the language of the Statute of Distributions, was her personal estate; and as she died intestate; any surplus thereof remaining in the hands of the administrator after payment of her debts and other charges; is aptly described by the words of the 4th sec. of cap. 78, Consol. Stat., which says that the surplusage of the personal estate of the intestate (which by the first section is defined to be any person who shall die intestate) shall be distributed by the Judge of Probate in the manner therein directed, and I.



think the Court is only following the plain directions of the Legislature by directing it shall be so distributed.

1890.

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*In re*  
CLEVELAND.

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Palmer, J.

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The great weight of the argument for the husband has been addressed to the fact that the Statute of Distributions did not, and ought not to be so construed as to interfere with his marital rights. In the view I take, this is an entire misapprehension. I do not think that such statute at all interferes with the husband's marital rights. I do not see how it could do so, for such marital rights are rights and property acquired by virtue of the marriage at the time of the marriage contract, and there are no such rights except such as pass from the wife to the husband by virtue of that contract.

I have, I think, above correctly and fully stated the whole of what such rights are. Thereafter, all the property so acquired was the husband's and not the wife's, and therefore, if she afterwards died intestate it would be impossible for such to be the property of a person dying intestate; simply for the reason that it was not her property at all. But we are dealing with what was this woman's property when she died intestate; and what marital rights can have to do with that, if the husband himself at the time of the death of his wife had no interest whatever in it, I am at a loss to understand. As I have said, you will find Judges and authors in England, often carelessly stating the right of the husband to the property of the wife, which could only be her choses in action that he had not reduced into possession; some supposing that it had its origin in the marital rights of the husband at common law, and others by virtue of the statute of Edward 3, as though his exact rights at common law and under the statute of Edward were in dispute, or were at all doubtful. When, I venture to affirm, there was nothing that was better understood than exactly what those rights were; for marital rights were wholly given by the common law, and were exactly as I have before stated and nothing more. When a wife died having choses in action, the property of which had not passed to the husband by virtue of the marriage, because he had not reduced them into possession, they went to the Crown; or rather to the administrator appointed by the Crown. He alone could collect them, and he was not obliged to account for them to any one.

1880.

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*In re*  
CLEVELAND.

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Palmer, J.  

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Therefore, *quoad* those, there was not a scintilla of right to them in the husband at common law which vested them in the administrator, and he alone could sue for them. Then came the statute of Edward by which the husband was given right to the administration, and by consequence as long as there was no obligation to account for them he had them, like any other administrator, for his own use. What his marital rights had to do with it, except so far as his being the husband gave him the right to the administration, it is impossible to conceive. It may be that it is not a very inaccurate expression to say that he had them by virtue of his common law marital right, because that right made him next friend, and then the statute of Edward gave the next friend the right to the administration.

Why was anybody entitled to administration? It could only be because the wife died intestate having some estate to be administered. Under such circumstances, if a statute had been passed by which all administrators instead of keeping the property for themselves were bound to administer the estate by first paying the intestate's liabilities and then dividing the balance among the next of kin, how could such administrator defeat the plain words of the Act, unless there was a clause in such an Act, that although other administrators should so administer, the husband, when administrator, should be excepted out of its operation? It matters not whether the husband's right was at common law or under the statute of Edward, if he held the property as administrator, and all administrators were bound to distribute the property that came into their hands as such amongst the next of kin; how could he be exempted unless it was done by virtue of a clause so exempting him from the operation of the Act, which is the case in England? And is it not evident that the husband would not be obliged to distribute the estate of his wife there, even if he had not the slightest interest in it other than as administrator?

By the order of the Judge of Probate in this case it was adjudged that the respondent, Cleveland, had money in his hands as administrator as the surplus of the estate: if so, I cannot see how it is possible that he is not compellable to distribute it among the next of kin, when the statute has declared that he

shall. If it was his by virtue of his marital rights, this determination of the Judge of Probate is wrong, and it appears to me that the respondent should have appealed from that decision, for as it stands he is estopped from saying that he has it not as administrator, but in his own right.

1890.  

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*In re*  
CLEVELAND,  

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Palmer, J.  

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These considerations reduce the claim of the next of kin to this: as to the property that would have passed to the husband by virtue of the marriage contract, or that would have so passed as acquired during marriage, the husband clearly has the right to it, unless such right is interfered with by the Married Women's Property Act. With reference to her choses in action not reduced into possession before her death, if there never had been any Married Woman's Property Act at all, he has no right to them except as administrator. Then as to the claim to the property which vests in the wife under the Married Women's Property Act, whether any right to it vests in the husband at all, is a question of construction of that Act. As I said before, I cannot see, if the property vests in the wife and is her separate property, how that property or any part of it or any interest in it can vest in the husband. Before the Act, the wife had no legal existence, and was totally incapable of acquiring property of any kind, and her husband was substitute for her. After the Act, that disability was removed, she was made capable of owning the property, and the Act declared that it would vest (equivalent to wholly vest), in her; and to make its meaning beyond all question, and to show that the Legislature did not intend that there should be any joint property, it declared it should be her separate property.

This property, it appears, she could dispose of by will, but of course in her life time, under certain restraints, nothing in which would indicate any idea of want of property but merely a supervision over her mode of disposing of her property, because the same restraints is upon the disposition of her real estate.

The first Act goes on to state that the object of putting the property in the wife was to prevent it being seized for her husband's debts, and there has been an argument attempted that this would qualify the character of the property vested in her, but I cannot see any necessity for that construction. The

1890.

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*In re*  
CLEVELAND.

---

Palmer, J.

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object of the Legislature, among other things, may have been that still the property would vest in her alone instead of her husband ; but now, even that argument fails, for the Act is changed in the Consolidated Statutes and the words used are "and it shall be exempt," etc., instead of "so as to be exempt."

Again, it is argued that the Act makes a difference between the property of a married woman abandoned, or deserted, or compelled to support herself and living apart from her husband, and the property acquired and belonging to her before marriage and after marriage when living with her husband. I can find no difference in the vesting her title to the property. The Act uses the same words in both cases. It is true that in the former case she is authorized to sue without her husband, and also dispose of her property without her husband ; but I cannot see that the husband has any more right to the property in the one case than the other.

SIR JOHN C. ALLEN, C. J. It is not disputed that if the law bearing on this case had continued as it was immediately after the passing of the Act 26 Geo. 3, cap. 11, secs. 14 and 17, regulating the distribution of the personal estates of persons dying intestate, there would have been no doubt as to the right of the husband of Mrs. Cleveland, to the whole of the personal estate to which she was entitled at the time of her death.

The 14th section contains substantially the provisions of the sixth and seventh sections of the English Statute of Distributions, 22 & 23 Car. 2, cap. 10 ; and the 17th section, adopting the words of 29 Car. 2, cap. 3, sec. 25, which was passed to remove doubts as to the husband's right to the effects of his deceased wife under the Statute of Distributions, declares that "nothing in this Act (26 Geo. 3 cap 11) contained shall be construed to extend to the estates of *femes covert* who shall die intestate, but that their husbands may demand, and have administration of their rights, credits, and other personal estates, and recover and enjoy the same as they might have done heretofore."

Under that statute, if a wife died leaving *choses in action* not reduced into possession by her husband, he would have the right to administration, and as her administrator he would

take the property for his own benefit; but he would take it *as husband, jure mariti*, and not as next of kin to his wife, which he is not. *Watt v. Watt* (1); *Betts v. Kimpton* (2); *Wms. Exor's.*, (7th ed.) 1489; 2 Kent's Com. 136.

1890.  
In re  
CLEVELAND.  
Allen, C. J.

The Statute 26 Geo. 3, cap. 11, remained in force till 1854, when it was repealed by the Revised Statutes, the 111th chapter of which in providing for the distribution of the personal estate of intestates, omits all reference to the rights of a husband in his deceased wife's estate, as provided for in the 17th section of 26 Geo. 3, cap. 11, and after stating the mode of distribution between the widow and children (if any) of an intestate, declares that if there be no widow, all the surplusage of the personal estate shall be distributed among the next of kindred in equal degree of the intestate, and their representatives.

Before this, in 1851, an Act, 14 Vic., cap. 24, was passed "to secure to married women real and personal property held in their own right."

The first section of that Act declared that "the real and personal property belonging to a woman before, or accruing in any way after marriage, except as hereinafter excepted, shall be owned as her separate property, and shall be exempt from seizure, execution, attachment, detention or responsibility in any way for the debts or liabilities of her husband, and shall not be conveyed, mortgaged, encumbered, or disposed of without her full consent or concurrence, testified by her being a party to the instrument conveying, &c., and duly acknowledged," &c. (The remainder of the section does not affect the present case.)

The second section provides that the exemption thereinbefore stated shall not extend to property received by a married woman from her husband during coverture.

The fourth section declares that nothing in the Act contained shall affect the right of dower of any woman in the property of her husband; "or the right of any husband in the property of his wife, otherwise than as herein expressly provided."

When the statutes were revised in 1854, the Act 14 Vic. cap.

(1) 3 Ves. 244.

(2) 2 B. & Ad. 273.

1890.  
*In re*  
 CLEVELAND.  
 Allen, C. J.

24, was repealed; and the 114th chapter of the Revised Statutes, treating of the real and personal property, of married women, enacted as follows in the first section:—"The real and personal property belonging to a woman before, or accruing after marriage, except such as may be received from the husband while married, shall be owned as her separate property so as to exempt it from seizure or responsibility in any way for the debts or liabilities of her husband, and shall not be conveyed, encumbered or disposed of without her consent," &c., (following the words of the first section of 24 Vic., cap. 24.)

This section was apparently intended to contain, in substance, all the provisions of the first, second, and fourth sections of the 14 Vic., cap. 24, except that part of section four relating to dower.

I think the 14 Vic., was not intended to interfere with the marital rights of a husband in his wife's property, except so far as to exempt it from seizure or responsibility for his debts. The 4th section expressly limits it to that; and therefore while that Act was in force, on the death of the wife, the personal property which had belonged to her, vested absolutely in her husband *jure mariti*.

I also think there is nothing in the first section of Chap. 114 of the Revised Statutes requiring a different construction from that. The words of that section are: "shall be owned as her separate property so as to exempt it from seizure," &c. That is, for the purpose of exempting it from seizure for her husband's debts, it is her separate property; but in other respects, the common law rights of the husband in his wife's personal property remained as they were before the Act passed.

If the Legislature had stopped there, I should not have had any difficulty in holding that the surviving husband was entitled to the personal property which had belonged to his wife, though it was held as her separate property during their joint lives, unless the Statute of Distributions has taken away that right.

Chapter 114 of the Revised Statutes was repealed in 1876 by the Consolidated Statutes, the 72nd chapter of which enacts as follows:—"The real and personal property belonging to a woman before, or accruing after marriage, except such as may be received from her husband while married, shall vest in her

and be owned by her as her separate property, and it shall be exempt from seizure or responsibility in any way for the debts or liabilities of her husband, and it shall not be conveyed, encumbered or disposed of during the time she lives with her husband, without her consent, testified, if real property, by her being a party to the instrument conveying, encumbering, or disposing of the same, duly acknowledged as provided by the laws for regulating the acknowledgments of married women; and after her abandonment or desertion by her husband, or upon her being compelled to support herself, or upon her living separate and apart from her husband, not wilfully and of her own accord, although neither deserted, nor abandoned by him, then her real and personal property may be disposed of as provided for in this Chapter, as if she were a *feme sole*, but her separate property shall be liable for her own debts contracted before marriage, and for judgments recovered against her husband for her wrongs."

The second section enacts, that in case of desertion or abandonment of any married woman by her husband, or of her living separate and apart from him not wilfully and of her own accord, although neither deserted nor abandoned by him, she may sue in her own name for services performed by her, and debts due to her; that her husband shall not have power to release or discharge her claims, and that the provisions of the section shall apply irrespective of whether the rights and property of the woman accrued before or after her marriage, or before or after the desertion or abandonment by her husband, or of her living separate and apart from him.

The third section declares that when any married woman abandoned or deserted by her husband, or compelled to support herself, or living separate and apart from her husband as in the first section stated, shall own or acquire any property, it shall be at her disposal, and shall not be subject to the debts, interference or control of her husband, but may be disposed of by her by deed or will, without the consent of her husband, in the same manner as if she were a *feme sole*; and that from the time of any such desertion, etc., all her property, whether acquired before or after marriage, or before or after such desertion, etc., shall vest in her as if she were a *feme sole*.

1890.

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In re  
CLEVELAND.

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Allen, C. J.  

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1890.  
*In re*  
CLEVELAND.  
Allen, C. J.

The fourth section declares that the husband of any woman so abandoned or deserted, or living separate and apart from her husband, or compelled to support herself, shall not have or acquire any estate, right, title or interest in or to any of her property, whether acquired before or after such abandonment, etc., and that a conveyance by her of any such property shall be good and effectual without her husband joining therein; but this is not to apply to property acquired from her husband during the marriage, or earned by her before desertion and abandonment, etc.

Now, it will be observed that there is a marked difference between the language used in the first section as to the tenure by which a married woman holds her separate property, and the language used in the third and fourth sections in respect to her property. In the first section it is no doubt said that her property is to vest in her, and be owned as her separate property, exempt from her husband's debts; but it is not said, as it is in the other sections, that she is to hold it as if she was a *feme sole*, or that she may dispose of it by will or deed without the consent of her husband. The distinction between the rights of married women in their separate properties under the first section, and their rights under the third and fourth sections are very clear. Under the first section, I think the marital rights of the husband are only suspended during the life of his wife, and that on her death, his marital rights revive, and the property devolves just as if her separate estate had never existed. There is no provision in the first section authorizing a married woman to dispose of her property without the consent of her husband, or vesting it in her in the same manner as if she were a *feme sole*; and the fact of such an important difference between the first section and the other sections makes it evident to me that the Legislature did not intend to deprive the husband absolutely of his marital rights in his wife's property, except in the cases mentioned in the third and fourth sections.

It is a rule in the construction of statutes that the whole of the Act must be considered, and not one part of it only by itself. In Co. Litt. 381 *a*, it is said that "it is the most natural and genuine exposition of a statute to construe one part of the



statute by another part of the same statute; for that best expresses the meaning of the makers." Again, in the *Lincoln College Case* (1) it is said "the office of a good expositor of an Act of Parliament is to make construction on all the parts together, and not of one part only by itself."

1890.  
In re  
CLEVELAND.  
Allen, C. J.

If these rules of construction are applied in the present case, it must be evident that the Legislature did not intend by the first section of cap. 72 to do anything more than to exempt the separate property of a married woman from seizure and responsibility for her husband's debts; nor to interfere with the husband's right to it on her death. If that was not the only intention, why was language so very different used in the other sections of the chapter which deal with cases where a woman is deserted or abandoned by her husband, or is compelled to maintain herself? Why were the words "as if she were a *feme sole*" omitted from the first section, but used in the third?

The question of the effect of "The Married Women's Property Act, 1882," in England, has been recently considered in the case of *Stanton v. Lambert* (2) where it was held that that Act had not altered the devolution of the undisposed personalty of a married woman; and, therefore, that on her death, without disposing of her separate personalty, the quality of separate personalty ceased, and the right of the husband to the undisposed personalty accrued as if the separate use of the wife had never existed.

The section of the Married Women's Property Act under which that case was decided, declares that "a married woman shall, in accordance with the provisions of this Act, be capable of acquiring, holding, and disposing by will or otherwise of any real or personal property as her separate property, in the same manner as if she were a *feme sole*, without the intervention of any trustee."

So, in the present case, I think that the quality of separate property which the wife had under the first section of cap. 72, ceased on her death, and that the right of the husband then accrued just as if her separate estate had never existed.

I will now consider how far the repeal of the 17th section of the Act 26 Geo. 3; c. 11, affects the question in this case.

(1) 3 Rep. 586.

(2) 39 Ch. D. 626.

1890.

*In re*  
CLEVELAND.

Allen, C. J.

It was contended on the part of the next of kin, that the effect of not re-enacting that section in the subsequent Acts before referred to, is that now the personal estate of a married woman devolves on her death upon her next of kin under the Statute of Distributions, Consol. Stat., c. 78, sec. 4.

I do not think that the law is clear that but for the 25th section of the Statute of Frauds, from which the 17th section of our Act 26 Geo. 3, c. 11, was copied, the personal property of a married woman would, on her death, vest in her next of kin, to the exclusion of her husband.

In *Humphrey v. Bullen* (1), where the question was whether the administrator *de bonis non* of the wife, or the administrator of the husband, was entitled to a legacy given to the wife, and which was unpaid at the time of her death, the Lord Chancellor said:—"I think clearly it was a vested interest in the husband, and therefore his administrator, as his representative, is entitled to it without being obliged to make distribution; for the husband is not within the equity of the Statute, [of Distributions] and it is explained besides by the last clause of the Statute of Frauds. \* \* \* Notwithstanding, by the rules of the common law the administrator of the wife is entitled to it, being a 'chose in action' not received or got in by the husband in his life time, yet equity will consider such administrator as a trustee for the administrator of the husband; for the husband having an absolute right to it by surviving his wife, his administrator ought to have the benefit of it."

So, in *Watt v. Watt* (2) the Lord Chancellor says that the husband is entitled to the personal property of his wife *jure mariti*; that her personal property vests in him by the marriage. That at the death of the wife, if it is necessary for him to have administration to enable him to get in her personal property, the administration is granted to him as husband. That the husband's right is supposed in all the statutes. That the Statute of Frauds had a clause that the Statute of Distributions should not prejudice the right of the husband; under an apprehension that his right might be considered to be affected by that statute.

Now, I gather from these cases, that without the 25th sec-

(1) 1 Ask. 458.

(2) 5 Ves. 344.

tion of the Statute of Frauds, the right of the husband to the personal property of his deceased wife, would have belonged to him *jure mariti*, and not to her next of kin; that that section was only declaratory of what the law was, and not the introduction of any new law.

1890).  
In re  
CLEVELAND.  
Allen, C. J.

The husband is not named in the Statute of Distributions. It applies only to a widow and children and next of kin. As the Lord Chancellor said in *Humphrey v. Bullen*, the husband is not within the equity of the Statute of Distributions.

In 1 Roper on Husband and Wife, 204, it is said that marriage is a qualified gift to the husband of his wife's *chooses in action*, namely, on condition that he reduce them into possession during its continuance; for if he happen to die before his wife without having reduced such property into possession, she, and not his personal representatives, will be entitled to it: citing Co. Lit. 351.

But if the husband survive his wife, then he, as her administrator, will be entitled to all her personal estate which continued in action, or was unrecovered at her death. And although he die before all such property be recovered, yet his next of kin will be entitled to it in equity. 1 Roper, 205.

The right to administration follows the right to the estate; and therefore the husband as administrator was entitled to all his wife's personal property whether reduced into possession, or recoverable by action or suit.

In Williams on Executors, 7th ed. 410, it is said that "the right of a husband to be the administrator of his wife, belongs to him exclusively of all other persons, and the ordinary has no power of election to grant it to any other. The foundation of this claim has been variously stated: By some it is said to be derived from the statute of 31 Edw. 3, on the ground of the husband's being the next and most lawful friend of his wife; while there are other authorities which insist that the husband is entitled at common law, *jure mariti*, and independently of the statutes. But the right, however founded, is now unquestionable, and is expressly confirmed by the statute 29 Car. 2, cap. 3."

In Com. Digest "Administrator," (B. 6), it is said that if a

1890. *feme covert* die intestate, administration shall be granted to the husband *de jure*.

*In re*  
CLEVELAND.

Allen, C. J.

After a careful consideration of the question raised in this case, I am of the opinion that the Statute of Distributions does not apply to a case where a married woman dies entitled to personal property, leaving a husband surviving; but that he is entitled to it *jure mariti*; and that his right does not depend upon the 17th section of the Act 26 Geo. 3, cap. 11, which was copied substantially from the 25th section of the 29 Car. 2, cap. 3, which was only passed to remove any doubts that might exist as to a surviving husband being affected by the Statute of Distributions; and as said by the Lord Chancellor in *Watt v. Watt*, "under an apprehension that his right *might* be considered to be affected by the statute."

It follows from this view of our statutes, and from the English cases on the subject, that the husband's right to his deceased wife's *choses in action* does not depend upon the 17th section of our first Statute of Distributions, and that the omission of the Legislature to re-enact that section, does not affect the rights of the husband in this case.

I think the appeal should be dismissed, and that the costs of all parties should be paid out of the estate—the question involved being a new and important one.

WETMORE and FRASER, JJ., concurred in the judgment of the majority of the Court.

*Appeal dismissed.\**

\* Affirmed on appeal by the Supreme Court of Canada. *Lamb v. Cleveland*, 19 Can. S. C. R. 78.

## EX PARTE FOLEY.

1889.

October 10.

*Spirituous Liquors — Right of Local Legislature to prohibit sale of—  
British North America Act, 1867.*

A mandamus was granted to compel the Council of a Municipality to hear and determine upon an application for a license to sell spirituous liquors under The Liquor License Act, 1887 (Vic. 50 c. 4), where the Council had refused to do so on the ground that a majority of the rate-payers of the Parish for which the license was sought, had petitioned against it as provided for by section 31 of the Act.

*Reg. v. Justices of Kings* (2 Pugs. 535) followed.

On the first day of Hilary Term, 1889, *Rand*, on behalf of William P. Foley, obtained a rule *nisi* for a mandamus to compel the Council of the Municipality of Gloucester to hear, and determine upon, his application for a license to sell spirituous liquors, by retail, in the Parish of Caraquet, under The Liquor License Act, 1887, (50 Vic. cap. 4).

The Council refused to consider the application, on the ground that they had no power to grant the license by reason of sec. 31 of the Act—a majority of the ratepayers in the parish for which the license was sought, having petitioned against it. It appeared that the applicant had complied with the provisions of the Act, and was entitled to have his application heard and determined, if the Council were not prevented from so doing by reason of the petition of the ratepayers.

It was submitted that section 31 was *ultra vires* of the Local Legislature, under the British North America Act. *Reg. v. The Justices of Kings* (1), and *Ex parte Danaher* (2), per Palmer and King, JJ., were referred to.

Section 31 enacts: "No license shall be granted, if a majority of the ratepayers in any city or incorporated town or parish petition against it."

February 16, 1889. *Blair, A. G.*, showed cause. The following authorities, which will be found in the cases decided on the British North America Act, 1867, collected by Cartwright, shew that the Local Legislature has power to pass the section restricting the granting of licenses: *Keefe v.*

(1) 2 Pugs. 535.

(2) 27 N. B. Rep. 564.

1889.

Ex parte  
FOLEY.

*McLennan* (1); *Blouin v. Corporation of Quebec* (2); *Poulin v. Corporation of Quebec* (3); *Corporation of Three Rivers v. Sulte* (4); *In re Slavin and the Corporation of the Village of Orillia* (5); *L'Union St. Jacques de Montreal v. Belisle* (6); *Citizens Insurance Company of Canada v. Parsons* (7); *Hodge v. The Queen* (8). The decision of the Judicial Committee of the Privy Council in the case under The Dominion Liquor License Act (46 Vic. cap. 30), and the Act in amendment thereof, is a clear authority in favor of the validity of the section.

*Rand*, in support of the rule. The case of *Reg. v. The Justices of Kings* has not been overruled by any of the cases referred to, and is conclusive as to section 31 being *ultra vires*.

*Cur. adv. vult.*

SIR JOHN C. ALLEN, C. J. We think that this case is governed by *Reg. v. The Justices of Kings*. The rule for a mandamus must be made absolute.

*Rule absolute.\**

1890.

O'BRIEN, APPELLANT, AND MILLER, RESPONDENT.

February 15. *Fishery officer (R. S. C., c. 95)—Ex officio a Justice of the Peace—Trespass—Notice of Action.*

Where a fishery officer under The Fisheries Act (R. S. C. cap. 95, sec. 12) had improperly seized a quantity of fish as being illegally caught with seines: *Held*, in an action against the officer, that as he was acting as a fishery officer in seizing the fish, and not as a Justice of the Peace, *ex officio*, under The Fisheries Act, he was not entitled to notice of action under The Consol. Statutes, cap. 90.

This was an appeal from the Gloucester County Court.

The action was brought to recover the value of a quantity of smelts which had been seized at the railway station in

(1) 2 Russ. & Ches. 5.  
(2) 7 Que. L. R. 18.  
(3) 9 Can. S. C. R. 185.

(4) 5 Legal News, 330.  
(5) 36 U. C., Q. B. 159.  
(6) L. R. 6 P. C. 31.

(7) 7 App. Cas. 94.  
(8) 9 App. Cas. 117.

\* See *Ex parte Danaher* (17 Can. S. C. R. 44.)

1890.

O'BRIEN  
v.  
MILLER.

Saint John, by the appellant, a Fishery overseer, under "The Fisheries Act," (R. S. C. cap. 95), while they were being shipped by the plaintiff, from Bathurst to Boston, U. S. The defendant pleaded the general issue by statute, relying on Consol. Stat. cap. 89, sec. 2, and Rev. Stat. of Canada, cap. 95, sec. 12, and gave several notices of defence, which were in substance, that the smelts had been caught with seines, contrary to the provisions of "The Fisheries Act," and the regulations made thereunder; that they were illegally in the possession of the plaintiff; and that the defendant in his official capacity, lawfully seized them, under the statute. The jury found that the smelts were caught by hooks and lines, and rendered a verdict for the plaintiff for \$55.50. In answer to a question submitted to them by the learned County Court Judge, they found that the defendant, in seizing the smelts, honestly believed that he was acting in the discharge of his official duty as fishery officer, and within his duty.

The defendant afterwards moved at Chambers, to set aside the verdict, and to have a nonsuit entered; which was refused.

February 4, 1890. *E. McLeod, Q. C.*, in support of the appeal. The defendant being a fishery officer, acting under the provisions of Rev. Stat. Can. cap. 95, is protected by Consol. Stat. cap. 89, and is not liable to an action. He is also by the Act *ex officio* a Justice of the Peace, and as such would be entitled under Consol. Stat. cap. 90 to a notice of action. No notice was given. The jury having found that the defendant, when he seized the fish, honestly believed that he was acting in the discharge of his official duty under the statute, and the evidence showing that such a state of things existed as would justify such belief, he would be entitled to a notice. *Chamberlain v. King* (1); *Selmes v. Judge* (2).

*D. L. Havington, Q. C.*, contra. The defendant in doing the acts complained of, was simply acting as a seizing officer. He did not act nor profess to act as a Justice of the Peace, and therefore a notice of action was not necessary. No judicial act is complained of. *Venning v. Steadman* (3), is entirely

(1) L. R. 6 C. P. 474.

(2) L. R. 6 Q. B. 734.

(3) 9 Can. S. C. R. 206.

1890. applicable. In that case it was held that the defendant, acting as a Dominion officer, was not entitled to notice of action.  
 O'BRIEN  
 v.  
 MILLER.

*McLeod, Q. C.*, in reply. In *Venning v. Steadman*, the Court held that the order in Council under which the defendant acted, was *ultra vires* of the Governor General, and for that reason a notice of action was not necessary.

*Cur. adv. vult.*

On a later day in Term, the Chief Justice stated that the Court (Palmer and Fraser, JJ., taking no part), were of the opinion that the defendant was liable, and that in doing the acts complained of, he was acting in the capacity of a Fishery officer, and not as a Justice of the Peace, and therefore was not entitled to a notice.

*Appeal dismissed with costs.*

1890.

O'DOHERTY v. BICKFORD.

February 4.

*Practice—Action brought in County Court and transferred to Supreme Court—Amount recovered within the jurisdiction of County Court—Whether certificate for costs can be granted.*

Where an action of assumpsit brought in the County Court was transferred to the Supreme Court by the County Court Judge, and no greater amount was recovered than might have been recovered in the County Court, the plaintiff is entitled to Supreme Court costs without a certificate of the Judge. (WETMORE, J., *dubitante*.)

The action not having been "brought" in the Supreme Court, is not a case where a certificate can be granted, under the Act 49 Vic. c. 18.

October 11, 1887. *R. B. Smith*, on behalf of the defendant, obtained a rule *nisi* for a review of the taxation of costs in this cause, on the ground that the plaintiff was not entitled to Supreme Court costs.

The action was brought on a promissory note in the County Court of Westmorland, but during the progress of the trial the Judge of the County Court considered the title to land came in question, and thereupon transferred the case to the Supreme Court under the power given to him by section 45 of the County Courts Act (Consol. Stat., cap. 51). On the trial in



this court the title to land was not brought into question in any way, and a verdict was found for the plaintiff for \$22. 1890.

O'DOHERTY  
v.  
BICKFORD.

It was submitted that if the County Court Judge considered the subject matter of the suit was not within the jurisdiction of the County Court, and transferred the cause to the Supreme Court, although improperly, it was, so far as relates to proceedings after the transfer, to be treated in all respects as if originally brought in that Court. By Act 45 Vic. cap. 9 sec. 7 as amended by 49 Vic. cap. 18 sec. 6 it is provided that if in any action brought in the Supreme Court that could have been brought in a County Court, the plaintiff recover no greater amount than might have been recovered in a County Court, he will not be entitled to Supreme Court costs unless the Judge shall certify that there was good cause for bringing the action in the Supreme Court. This was not a case in which the Judge could grant such a certificate, as the action was not "brought" in the Supreme Court, and therefore the plaintiff was only entitled to costs according to the table of fees in County Courts. *Good v. Merrithew* (1) was referred to.

February 4, 1890. *D. L. Hunington, Q. C.*, shewed cause. By the statute of Gloucester, the plaintiff, in all actions in which he recovers damages, is also entitled to his costs of suit. The Acts 45 Vic., cap. 9, sec. 7, and 49 Vic., cap. 18, sec. 6 only apply to causes brought in the Supreme Court. This action was not "brought" in this Court, but in the County Court, and section 46 of the County Courts Act declares that after the proceedings have been transmitted under the order transferring the cause to the Supreme Court, the cause "shall thereupon be dealt with" in that Court. The words "dealt with" are broad enough to embrace all proceedings, including the taxation of costs. The cause cannot go back to the County Court, as there is no authority in a case like the present for taxing the costs according to the scale of fees in the County Court.

*Blair, A. G.*, in support of the rule. The order of the Judge transferring a case to the Supreme Court places it in the same position as if originally brought in that Court, and if

1890.

O'DOHERTY  
v.  
BICKFORD.

the order was improperly made, the statute regulating costs in the case of a suit being improperly brought in the Supreme Court will apply. (WETMORE, J. Why did the defendant not appeal from the order of the County Court Judge?) It was equally the right of the plaintiff to appeal, and he, having acquiesced in the order, can only get such costs as he would have been entitled to if he had brought his action in the Supreme Court. The costs in the County Court up to the time of the transfer are provided for by sec. 45 of cap. 51 Consol. Stat.; and the Act contemplates that the cost of the proceedings in the Supreme Court shall be according to the provisions of the statutes regulating costs in that court.

Sir J. C. ALLEN, C. J. I think there is no reasonable doubt about this case.

The plaintiff brought his action in the County Court, which *prima facie* was the proper Court; but during the progress of the trial the Judge of the County Court considered that the title to land came in question, and thereupon transferred the case to this Court, under the power given to him by the 45th sec. of the County Courts Act.

It may be that either party might have appealed against that decision, but neither of them did so; and therefore it may be taken that the case was properly transferred to this Court.

Under these circumstances, I think the plaintiff would be justified in saying that he need not appeal against the order, because, as he had not "brought" his action in this Court, there was no statute which deprived him of Supreme Court costs.

If the plaintiff had brought his action in this Court, he could only have taxed County Court costs, unless he obtained the Judge's certificate that there was good cause for bringing the action in this Court; but no such certificate could have been granted in this case, because this action was not brought in this Court. The words of the Act 45 Vic., cap. 9, sec. 7, as amended by 49 Vic., cap. 18, sec. 6, are: "If in any action brought in the Supreme Court that could have been brought in a County Court, the plaintiff shall recover no greater amount than might have been recovered in a County Court, he shall

be allowed costs according to the table of fees in County Courts, and no more; unless the Judge who tried the case shall certify that there was good cause for bringing the action in the Supreme Court."

1890.  
O'DOHERTY  
v.  
BICKFORD.  
Allen, C. J.

Unless that Act applies to this case—and I am satisfied it does not—there is no Act which deprives the plaintiff of Supreme Court costs.

KING and TUCK, JJ., concurred.

WETMORE, J. I am inclined to think that the plaintiff having chosen to submit to the order of the County Court Judge transferring the cause to the Supreme Court, cannot now object to the effect of the order; and that the case should be dealt with as if originally brought in the Supreme Court. I do not wish to dissent, but I have great doubts whether the plaintiff is entitled to more than County Court costs.

*Rule discharged without costs.*

NOONAN, APPELLANT, AND THE BANK OF BRITISH NORTH AMERICA, RESPONDENT.

1890.  
February 15.

*Practice — County Court — Postponing trial on usual terms of paying costs — Settlement of cause after service of order — Power of Judge afterwards to vary order so as to include the costs of opposing postponement.*

The trial of a cause in the County Court was postponed by the Judge "on the usual terms of paying costs." The order served, directed the defendant to "pay to the plaintiff any costs he had been put to in preparing for trial." The parties then settled the cause on the terms that the defendant should pay the taxable costs; but before the costs were taxed, the County Court Judge, on application of the plaintiff, amended his order so as to include the plaintiff's costs of opposing the postponement.

*Held*, that the original order having been acted upon, the Judge had no power afterwards to vary it, even though it did not express his intention on the motion for the postponement.

This was an appeal from the Northumberland County Court.

The appellant (the defendant below), in an action brought by the respondent, applied to the County Court Judge after notice of trial, and obtained an order on the 23rd July, 1888, postponing the trial from the July term of the Court for

1890. which the notice was given, until the following October term,  
NOONAN "on the usual terms of paying costs." The order was after-  
v. wards drawn up by the defendant's attorney, and presented to  
THE BANK OF the Judge for his signature. On reading the order, the Judge  
BRITISH expressed some doubts as to whether the terms stated in it,  
NORTH AM- sufficiently expressed the intention of the order as made by  
ERICA. him. The terms in the order, as drawn up, were these: "I do  
order that defendant do pay to the plaintiffs any costs they  
may have been put to in preparing for trial of the cause at  
the approaching July term." After the service of the order,  
the parties settled the cause on the terms, among others, that  
the defendant should pay the plaintiffs their taxable costs.  
The plaintiffs' attorney on making up his costs, claimed the  
costs of opposing the application to postpone the trial, includ-  
ing a counsel fee thereon, for which he had obtained a fiat.  
Having learned from the defendant's attorney, that he would  
resist the allowance of the costs of the postponement, the  
plaintiffs' attorney did not submit the costs to the clerk for  
taxation; but on the 2nd November, 1888, took out a sum-  
mons calling upon the defendant to shew cause why the  
form of the order of the 23rd July, "should not be amended  
by more plainly and clearly expressing the purpose, meaning  
and intention of the order as made and explained at the  
time of the postponing the said trial; and why, for this purpose,  
there should not be added to the said order at the end thereof,  
these words 'and also the usual costs of opposing the appli-  
cation to postpone, including any counsel fee allowed or to be  
allowed by the Judge to the plaintiffs' counsel, on argument at  
Chambers in opposing the application;' or such other words as  
may be fitting to express the real meaning of the order made."  
This summons was, after argument, made absolute by order  
dated 23rd November; and the order of 23rd July, was  
amended by adding the words proposed in the summons.

From that order the present appeal was taken.

January 30, 1890. *Geo. F. Gregory*, in support of the appeal.  
The first order was in effect, what is admittedly the order  
made by the County Court Judge, that is, "on the usual terms  
of paying costs." Under that order it would have been a

question for the taxing officer as to what costs could be obtained. The second order goes much further. It gives, not only the costs that the plaintiff may have been put to in preparing for trial, but the costs of opposing the application for postponement. The latter costs do not form any part of what is known as "usual terms." Arch. Pr. (11th ed.), 1478. The Judge having made one order, the matter was *res judicata*, and he had no power to alter or add to his judgment. Even if he could do so, the application therefor must be made within a reasonable time, and before the order has been acted upon. Arch. Pr. (11th ed.), 1597; *Gordon v. Hall* (1); *Avery v. United States* (2); *Lander v. Gordon* (3); *Tommey v. White* (4); *Lady De la Pole v. Dick* (5). Here, the order had been acted upon in the settlement of the cause. There is nothing in the proceedings to shew that there was any intention or understanding that the defendant was to pay the costs of opposing the application, or that the judgment given was to that effect, or so intended or understood, or even asked for by the plaintiffs at the argument. The cause had been settled on the basis of the order as made, and the plaintiffs are estopped from claiming any addition to the order, no matter what was intended by the judgment given; and the Court was without any further jurisdiction over the parties or the subject matter, except to enforce the order already made.

1890.

NOONAN  
v.  
THE BANK OF  
BRITISH  
NORTH AM-  
ERICA.

*Jordan, contra.* The second order only altered the form of the first order, and did not in any way affect or add to the judgment as given by the County Court Judge. As to the delay in applying for the amendment, the County Court Judge was satisfied that the delay had been satisfactorily accounted for, and this Court has no power to review his decision in this respect. It is also submitted that this is not a case for appeal. There was no decision on a point of law. *Ex parte Brown* (6); *Ex parte McCulley* (7). The second order is in the terms of the judgment of the Judge upon the application for the postponement, and no point of law arises by reason of the order being now altered so as to agree with the judgment. The

(1) 11 W. R. 281.  
(2) 12 Wall. 304.  
(3) 7 M. & W. 218.

(4) 3 H. L. Cas. 49.  
(5) 29 Ch. D. 351.  
(6) 25 N. B. Rep. 598.

(7) 4 P. & B. 37.

1890.  
 NOONAN  
 v.  
 THE BANK OF  
 BRITISH  
 NORTH AM-  
 ERICA.

order, as originally taken out, was drawn improperly, and might be amended at any time, until the costs were taxed under it. The proper time to raise the objection to the form of the order was not at the taxation of the costs, as then the plaintiffs would have been met with an order on its face, only giving the costs of preparing for trial. Where an order is irregularly or inadvertently taken out, the Judge has power to make it right. See *Hall v. West* (1).

*Gregory*, in reply. Appeals have been allowed in a number of cases of the same character as the present. *Harnett v. Wry* (2); *Hanington v. Stewart* (3); *Gregory v. McQuade* (4).

*Cur. adv. vult.*

The judgment of the Court was now delivered by

SIR JOHN C. ALLEN, C. J. We think that the application to amend the first order was made too late, even if, as taken out, it did not fully express the intention of the County Court Judge on the motion for the postponement. The plaintiffs, after being served with the order, went on and made a settlement of the suit with the defendant, and it must be assumed that the settlement was made with a full knowledge of the order. The original order having been acted upon, the Judge had no power afterwards to vary it. The appeal must be allowed with costs.

*Appeal allowed with costs.*

(1) 1 D. & L. 412.  
 (2) 25 N. B. Rep. 258.

(3) 1 Puga. 242.  
 (4) 3 Puga. 1.

1889.

October 10.

## EX PARTE WALLACE.

*Summary Convictions Act — Conviction adjudging a penalty and costs — Who entitled to receive them.*

The penalty and costs adjudged to be paid by a conviction under The Summary Convictions Act, must be paid to the convicting Justice, and not to the prosecutor.

Per PALMER J., that the costs may be paid to the prosecutor.

This was an application to a Judge at Chambers for an order for the discharge of one William Wallace, a prisoner confined in the Westmorland County gaol under a warrant of commitment upon a conviction for a violation of the second part of the Canada Temperance Act.

It appeared from the affidavits that the conviction was in the form (J. 1) given by the Summary Convictions Act (R. S. C. cap. 178) which, after setting forth the offence, adjudged "the said William Wallace, for his said offence, to forfeit and pay the sum of fifty dollars, to be paid and applied according to law, and also to pay to the said Busba Reed (the prosecutor) the sum of five dollars for his costs." That a warrant of distress for the purpose of levying the penalty and costs was issued and returned unsatisfied, and a warrant of commitment was then issued, on which Wallace was arrested. Previous to his arrest he had paid the prosecutor the amount of the penalty and costs. The warrant of commitment was in the form (N. 5) given in the Summary Convictions Act, and directed the keeper of the gaol to imprison the defendant for 75 days, unless the penalty and costs were sooner paid to him.

The only question was whether the defendant had a right to pay the prosecutor the money, and thereby deprive the magistrate, who made the conviction, of the power to imprison him.

The matter having been referred to the Court,

October 26, 1888, *Geo. W. Allen* argued for the defendant. He was fully justified in paying the prosecutor the amount of the penalty and costs, and such payment was a bar to any further proceedings upon the conviction. The magistrate can

1889.

*Ex parte*  
WALLACE.

only move at the instance of the prosecutor. Parliament has placed a case tried under the Summary Convictions Act, in the same position as a civil suit; and the magistrate has no jurisdiction to proceed upon the return of the warrant of distress except on motion of the prosecutor. This must be true as to the costs at least, which are adjudged to be paid to the prosecutor. Having paid the costs, he is no longer liable to be imprisoned the full 75 days, and the keeper has no power to divide the term of the imprisonment. Unless, therefore, the costs are again paid he must remain in gaol.

*J. A. Van Wart, contra.* The prosecutor has no power to stay the proceedings after the magistrate has once acquired jurisdiction. The moment the defendant is once before the Court, the magistrate may proceed in his absence, and in the absence of the prosecutor. Secs. 41 and 49 of the Summary Convictions Act. See also *Bradshaw v. Vaughton* (1). This does away with the contention that the case is like a civil suit. The magistrate is the only person authorized to receive the penalty and costs. If the amount is recovered under the warrant of distress, the officer having the warrant must pay the money to the magistrate that he may pay and apply the same as the law directs. The direction in the warrant of distress is also that the constable shall proceed to sell unless the several sums (the penalty and costs) are paid to him. Even if the defendant has a right to pay the prosecutor his costs, each day of the imprisonment being equally for the costs and for the penalty, the payment of any part, or the whole of either the penalty or the costs, does not relieve him from any portion of the imprisonment. If he paid the fifty dollars to the keeper of the gaol, or had rightly paid the costs to the prosecutor, then he might get his discharge on *habeas corpus*.

*Cur. adv. vult.*

The following judgments were now delivered:

TUCK, J. In this case the defendant was convicted under the Canada Temperance Act, and adjudged to pay a penalty of fifty dollars and costs. A distress warrant having been issued and returned, a warrant was issued for the arrest of the de-

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(1) 30 L. J. C. P. 93.



fendant, but before he was arrested he paid the money to the complainant. The only question on this application is, had Wallace a right to pay the money to Busba Reed, the prosecutor, and thereby deprive the convicting magistrate of the power to send him to prison?

1890.

Ex parte  
WALLACE.Tuck, J.

I think that the prosecutor cannot, by having the penalty and costs paid to himself by the person who has been convicted, take away the magistrate's power to commit the defendant to prison. When information has been laid before a magistrate for an offence against the second part of this Act, he thereby acquires jurisdiction to determine the case, and that jurisdiction cannot be taken away by any agreement between the prosecutor and accused. The proceedings are in their nature criminal, and are instituted for the benefit of the public, and therefore it is that no compromise between the parties is permitted to interfere with the magistrate's action. This is clearly the law, as regards the right of the justice, down to the time of conviction.

There is, in my opinion, no authority for the contention, that after conviction and distress issued and returned, the case can be settled between the prosecutor and the accused. If this were allowed, the ends of justice might be entirely frustrated. A private agreement could be made whereby penalty and costs paid for the time to the prosecutor might afterwards be returned, or a part of it be returned to the person who had been convicted. And thus by a trick, prosecutions under the Act would be rendered wholly unavailing. When the informant sets the law in motion, he has no power to control the prosecution before conviction, nor to collect either penalty or costs afterwards.

Whenever a warrant of distress has issued against any person, by sec. 97 of The Summary Convictions Act (R. S. C. cap. 178), such person may pay the sum or sums of money mentioned in the warrant to the constable having the execution of it; and whenever any person is imprisoned for non-payment of penalty or other sum, he may, by section 98, pay to the keeper of the prison the sum mentioned in the warrant of commitment. But nowhere in the Act is it provided that a constable shall cease to execute a warrant of distress, or that a keeper shall discharge a prisoner, if the person convicted pay

1889.

Ex parte  
WALLACE.Tuck, J.

the sum or sums mentioned in the warrant to the prosecutor.

After the adjournment of any hearing, the justice may proceed with the trial of a case, if, at the time and place to which the hearing has been adjourned, neither prosecutor nor defendant appears personally or by counsel: sec. 49. Looking at sections 54, 58, 60, 64 and 66, and the whole scope of the Summary Convictions Act, as to the payment of penalty and costs, and the manner in which they shall be collected, I am satisfied that it was never contemplated that any person, after conviction, should settle with the prosecutor either as to penalty or costs. When in section 58, it is provided that a justice may, in his discretion, order that the defendant shall pay to the prosecutor or complainant, costs, it is not meant that the money shall be paid into his hands, and that he shall give the defendant a receipt for it, but rather that the costs of prosecution shall be paid, and received in the first instance, by the person who is entitled under the Act to receive the penalty. If the defendant could deal with the magistrate as to part, and the prosecutor as to part, it would give rise to endless confusion. If this is true in respect of the costs, *a fortiori* it is true as to the penalty.

In my opinion the application for his discharge must be refused.

SIR JOHN C. ALLEN, C. J., WETMORE, KING and FRASER, JJ., concurred.

PALMER, J. It is clear to my mind that the defendant has the right to pay to the prosecutor his costs. Section 58 of the Summary Convictions Act enacts that the defendant should pay to the prosecutor such costs as to the Justice seems reasonable, and the words of the conviction are that he should pay the costs to the prosecutor. I am therefore of the opinion that the warrant under which the defendant is held is a nullity. The magistrate has no power to compel him to again pay the costs. If the warrant can issue at all, it must be for the penalty only.

*Application refused.*

EX PARTE THE FREDERICTON AND ST. MARY'S RAILWAY  
BRIDGE COMPANY.

1890.

*February 13.*

*Fredericton and St. Mary's Railway Bridge Company — Whether a Railway Company within 33 Vic. cap. 46 — Exemption from Taxation.*

The Fredericton and St. Mary's Railway Bridge Company incorporated by Dominion Act 48 & 49 Vic. cap. 26, is a Railway Company within the meaning of the Act of Assembly 33 Vic. cap. 46; and is exempt from taxation under the provisions of that Act.

Special case agreed upon and stated for the opinion of the Court, on which the Court was at liberty to make such order as they might see fit on the questions submitted, in the same manner as though they came before the Court on an application by the Railway Bridge Company for a writ of *certiorari*.

1. The applicants are a corporation created by the Parliament of Canada, 48 & 49 Vic. cap 26.

2. The applicants have constructed under the provisions of said Act, and are the owners of a steel railway bridge across the river St. John, between the City of Fredericton and the Parish of St. Mary's, wholly within the City of Fredericton, and have also constructed and own and operate the necessary approaches thereto, and a branch line of railway necessary to effect the junction or connection of the bridge with the Fredericton Railway on the west side of the river St. John, within the City of Fredericton, and with the Northern & Western Railway on the eastern side of the river, in the Parish of St. Mary's. The bridge approaches and branch lines are used solely for railway purposes.

3. The applicants are assessed in the City of Fredericton under the City of Fredericton Assessment Act of 1874, and amendments thereto, for the year 1889, on the steel railway bridge and railway within the City of Fredericton, and other real estate not used in connection with the railway bridge and railway, in the sum of \$1,275.00.

4. The applicants admit that any property belonging to them in the City, not used in connection with their bridge, railway, rolling stock, station houses and grounds, is not exempt from local taxation in the City of Fredericton.

1890.

*Ex parte*  
THE FREDER-  
ICTON AND  
ST. MARY'S  
RAILWAY  
BRIDGE COM-  
PANY.

The questions for the opinion of the Court on the above facts were:—

1. Is the said Railway Bridge company a railway company within the meaning of section 2 of the Act of Assembly, 33 Vic. Cap. 46.

2. Is the said railway bridge liable to taxation in the City of Fredericton?

3. Is the said railway, rolling stock, station houses and other property used by applicants in connection with the said railway bridge and railway, liable to taxation in the City of Fredericton?

4. Is the roadway of said Company in the City of Fredericton, consisting of the said bridge, approaches, and railway, constructed as aforesaid, liable to taxation in the City of Fredericton.

33 Vic. cap. 46, sec. 1, enacts as follows:

That all the real and personal property belonging to the European and North American Railway Company for extension from Saint John westward, shall be exempt from taxation in any or either of the counties through which the said Railway passes, so long as the same shall be held and possessed by the said European and North American Railway Company for extension from Saint John westward.

Sec. 2. That the exemption provided by this Act shall extend to the roadway, rolling stock, station houses, and grounds and other property used in the running of trains of all railway companies in this Province.

Sec. 3. The exemption provided by this Act shall not extend to actual profits derived from the running of any railway, after deducting expenses.

48 & 49 Vic. cap. 26, gives the Company power to erect a Bridge across the river St. John; and then in section 8 provides that:—

“The Company are hereby authorized to work trains by steam for passengers and freight and general traffic, between Fredericton and St. Mary's, and to connect the said trains with other railways already constructed, or to be hereafter constructed; and if necessary, to construct such branch line or lines of railway as may be necessary to effect the junction or connection of such bridge with any railway constructed or hereafter to be constructed, either in the said City of

Fredericton or Parish of St. Mary's, or across the said river St. John, between the Parish of Kingsclear and the Parish of Douglas." 1890.

*Ex parte*  
THE FREDER-  
ICTON AND  
ST. MARY'S  
RAILWAY  
BRIDGE COM-  
PANY.

January 29, 1890. *Blair, A. G.*, on behalf of the Company. The question in this case depends upon the construction to be given to section 2 of 33 Vic., cap. 46. The words describing the property thereby exempted from taxation, are broad enough to include the bridge and property used in connection with it, if the applicants are a railway company, which they clearly are under their Act of incorporation. (Palmer, J.: Does their Act of incorporation give them power to run trains, or only to build a bridge for the use of railway companies?) Section 8 gives the company full power to run trains and carry passengers and freight.

*Jordan*, for the City. The intention of the Legislature in passing 33 Vic. cap. 46, was to exempt certain property of railway companies from taxation. The property in order to be exempt must be the property of a railway company, and must be used in the running of trains. The applicants are not a railway company, but a company organized, as their Act of incorporation shows, to erect a bridge across the river Saint John, for the use of railway companies. In order to constitute them a railway company, they must have power to run trains and act as common carriers. The fact that they have power to run their own cars over the bridge, and to use it for the purposes of railway companies, does not bring them within the exemption given by sec. 2. Bridges on a railroad are in a different position; they are an essential part of the railway company, and would be exempt. The power to build approaches, and to make connections with railway companies, is only incidental to this company as a bridge company.

*Blair, A. G.*, in reply.

*Cur. adv. vult.*

The judgment of the Court was now delivered by

SIR JOHN C. ALLEN, C. J. We think it is very clear that the Act 48 & 49 Vic. cap. 26, incorporating the "Fredericton

1890. *Ex parte* THE FREDER-  
ICTON AND  
ST. MARY'S  
RAILWAY  
BRIDGE COM-  
PANY. and St. Mary's Railway Bridge Company," constitutes the corporation a railway company, and gives them all the powers of such a company. Sections 1 and 8 of the Act put the matter beyond all question. It therefore follows that the exemption provided by sec. 2 of 33 Vic. cap 46, applies to this company.

*Judgment accordingly.*

1889.

EX PARTE KELLY.

October 10.

*Canada Temperance Act — 51 Vic., c. 34 — Form of Informtaion — When imperative — Conviction as for a first offence — Whether previous conviction must be charged.*

An information for an offence under The Canada Temperance Act may be either in the form (A) given by the Summary Convictions Act, or in form (R) given by the Act 51 Vic., cap. 34.

It is not necessary to sustain a conviction as for a first offence under sec. 115, sub-sec. (c.) of The Canada Temperance Act, that a previous conviction should be charged.

This was an application for a writ of *certiorari* to remove a conviction of the applicant, Patrick Kelly, had before the Police Magistrate of the Town of St. Stephen, for a first offence of selling intoxicating liquors contrary to the provisions of the second part of The Canada Temperance Act. The objections to the conviction were: 1. That the Magistrate acted without jurisdiction, in that the information varied from the form prescribed by the Act 51 Vic., cap. 34, in amendment of The Canada Temperance Act. The form of information (A) given in the Summary Convictions Act (Rev. Stat. Can., cap. 178) was followed, stating that the informant "has just cause to suspect and believe, and does suspect and believe," and not form (R) prescribed by Act 51 Vic., cap. 34, which states that the informant "says he is informed and believes" that the defendant had unlawfully sold intoxicating liquors. 2. That the information and conviction, although as for a first offence, should have charged a previous conviction.

tion — it having appeared that the defendant had been previously convicted.

1889.

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*Ex parte*  
KELLY.

An order *nisi* having been granted by His Honor Mr. Justice Palmer, at chambers,

April 22, 1889, *Blair, A. G.*, shewed cause. Sec. 14 of Act 51 Vic., cap. 34, does not make it imperative that the forms given in the schedule to that Act shall be used, but declares that those forms, or forms to the like effect, shall be sufficient. The effect of the Act is to prescribe additional forms alleging the same matter in different words, and not to prohibit the use of the old forms. As to the alleging of a previous conviction, that is altogether unnecessary. Sec. 115, sub-sec. (c.) of The Canada Temperance Act (R. S. C., cap. 106), in express words declares that a conviction may in any case be had as for a first offence, notwithstanding there had been a prior conviction.

*Macmonagle*, in support of the rule. The Summary Convictions Act is only made applicable to proceedings under The Canada Temperance Act so far as no provisions are made in the latter Act. By Act 51 Vic., cap. 34, forms have been prescribed for the information and the conviction, and they must be adopted. As to the second objection, sec. 100 of The Canada Temperance Act provides different penalties for first, second, third and subsequent offences, and if that stood alone, the convictions must necessarily have followed that order. But sec. 115 declares that *in case of a previous conviction being charged*, the proceedings may be as therein set forth. And sub-sec. (c.) only applies to a case where a previous conviction has been charged,

*Cur. adv. vult.*

The judgment of the Court was now delivered by

TUCK, J. All objections to the validity of this conviction have been disposed of by this Court, except those relating to the form of information and the form of conviction.

New forms are given in the schedule to 51 Vic., cap. 34. (Stats. of Canada), which is an Act to amend The Canada Tem-

1889.

*Ex parte*  
KELLY.

perance Act. Section 14 of this Act provides that "the forms given in the schedule to this Act, or any forms to the like effect, shall be sufficient in the cases thereby respectively provided for; and where no forms are prescribed by the said schedule, new ones may be framed in accordance with 'The Canada Temperance Act,' or with 'The Summary Convictions Act.'"

Section 15 is as follows: "Forms (M) and (N) in the schedule to this Act are hereby substituted for forms (M) and (N) in the schedule to 'The Canada Temperance Act.'" These are the forms of information to obtain a search warrant, and of a search warrant. It is to be remarked that these are by express words substituted for the same letters (M and N) in The Canada Temperance Act; so that the old forms are repealed.

The language of section 14 is different. By this section the forms given in the schedule, or any forms to the like effect, are declared to be sufficient in the cases thereby respectively provided for. If, then, forms to the like effect are found in the Summary Convictions Act, such forms are sufficient. Form (R) in 51 Vic., cap. 34, is the general form of information, and differs from form (A) in The Summary Convictions Act in this respect, that whereas in the former it is stated the informant says "he is informed and believes;" in the latter, the words are, "he has just cause to suspect and believe, and does suspect and believe." There is no material difference between the two forms. Form (T) in cap. 34 is that of a conviction for first offence. Form (N 1) in The Summary Convictions Act is a warrant of distress upon a conviction for a penalty.

The contention here is, that the conviction is bad because the old forms found in the Summary Convictions Act are used, instead of those in the schedule to the amended Act.

We think the new forms in the amended Act are given for convenience, and to prevent mistakes being made by magistrates. It will be seen that they are made to apply exclusively to offences under The Canada Temperance Act, and thus save a difficulty which might often arise in adapting the forms in the Summary Convictions Act to such offences. The old forms used in the present case are to the like effect as the new ones, differing in language rather than in substance. It is manifest



that the legislature did not intend to prescribe the new forms as the only ones which should be used, but in words provides that forms to the like effect shall be sufficient.

1839.  
*Ex parte*  
KELLY.

Being of opinion that forms to the like effect have been used here, we think the conviction ought to stand.

*Rule discharged.*

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EX PARTE SHEHAN.

1891.

*Canada Temperance Act—Conviction—Costs of commitment and conveying defendant to gaol.*

February 12.

A conviction under The Canada Temperance Act may include the costs and charges of the commitment and conveying the defendant to gaol in default of distress.

In Michaelmas Term, 1890, on motion of *J. A. Van Wart*, a rule *nisi* for a *certiorari* was granted to remove a conviction of John Shehan, had before Thomas L. Alexander, Commissioner for the Parish of Gladstone Civil Court, for selling intoxicating liquors contrary to the provisions of the second part of The Canada Temperance Act.

The objection to the conviction was, that it included the costs of commitment and conveying the defendant to gaol in default of distress. *Reg. v. Oakes* (1), *Reg. v. Perley* (2), and *Reg. v. Ferris* (3), were cited.

January 31, 1891. *McCready* shewed cause. The Magistrate, in drawing up his conviction, followed Form (T) prescribed by the Act 51 Vic., cap. 34, amending The Canada Temperance Act. The cases of *Reg. v. Ferris* and *Reg. v. Oakes* are not in accordance with the decisions of this Court. See *Ex parte White* (4), and *Reg. v. Sullivan* (5), which decide what forms are to be adopted. *Reg. v. Ferris*, however, has been over-ruled by the case of *Mechiam v. Horne*, reported in the current volume of The Canada Law Times, p. 4. See also *Reg. v. Menary* (6).

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(1) 21 N. S. Rep. 481.  
(2) 25 N. B. Rep. 43.

(3) 18 Ont. R. 476.  
(4) 4 P. & B. 552.

(5) 24 N. B. Rep. 149.  
(6) 19 Ont. R. 691.

1890.

*Ex parte*  
SHEHAN.

*J. A. Van Wart*, in support of the rule. The Act on which the conviction is founded does not provide for costs, and the case of *Reg. v. Harshman* (1) applies. See *Reg. v. Good* (2), and *Reg. v. Salter* (3), in addition to the authorities cited in moving for the rule.

*Cur. adv. vult.*

The following judgments were now delivered :

SIR JOHN C. ALLEN, C. J. The question in this case is, whether a conviction for selling liquor in violation of the second part of The Canada Temperance Act, is bad if it includes the costs of the commitment and conveying the defendant to gaol for want of distress.

The 107th section of The Canada Temperance Act, (Rev. Stat., cap. 106), as amended by 51 Vic., cap. 34, sec. 9, declares that every offence against the second part of that Act may be prosecuted, and the penalties and punishments therefor enforced, in the manner directed by the Summary Convictions Act, so far as no provision is made by The Canada Temperance Act for any matter or thing which is required to be done with respect to such prosecution ; and that all the provisions of the Summary Convictions Act shall be applicable to prosecutions under The Canada Temperance Act, in the same manner as if they were incorporated in that Act.

Under the head of "Warrants of Distress and Commitment," the 62nd section of the Summary Convictions Act enacts, that whenever a conviction adjudges a pecuniary penalty to be paid, and by the Act or law authorizing such conviction, no mode of raising or levying the penalty, or of enforcing the same is provided, the Justice making such conviction, or any Justice in the same territorial division, may issue a warrant of distress for the purpose of levying the same.

The 66th section enacts that if at the time and place appointed for the return of any warrant of distress, the constable, who had the execution of the same, returns that no goods could be found whereon to levy the sums mentioned, the Justice may issue a warrant of commitment requiring a constable to convey

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(1) 1 Puga. 317.

(2) 17 Ont. R. 725.

(3) 20 N. S. Rep 202.

the defendant to the common gaol, and deliver him to the keeper thereof, and requiring the keeper to receive the defendant, and imprison him in the gaol, or to imprison him and keep him at hard labor, in the manner and for the time directed by the law on which the conviction was founded, unless the sums adjudged to be paid, and all costs and charges of the distress, "and also the costs and charges of the commitment and conveying the defendant to prison, if such Justice thinks fit so to order (the amount thereof being ascertained and stated in such commitment), are sooner paid."

1891.  
*Ex parte*  
 SHEHAN.  
 Allen, C. J.

The 67th section declares that whenever by the Act on which the conviction is founded, the Justice is authorized to issue a warrant of distress to levy the penalties, but no further remedy is provided in case no sufficient distress is found; and whenever the Act on which the conviction is founded provides no remedy in case it shall be returned to a warrant of distress that no sufficient goods of the defendant can be found, the Justice may, if he thinks fit, by his warrant as aforesaid, commit the defendant to prison for any term not exceeding three months.

This last section has no application to convictions under the second part of The Canada Temperance Act, because that Act gives no authority to issue a warrant of distress to enforce payment of the penalties provided by section 100 for violations of the second part of the Act. But section 66 expressly authorises the Justice to include in the warrant of commitment, the costs of the commitment and conveying the defendant to prison.

The combined effect of sections 62 and 66 therefore is, to authorise a distress warrant to issue for the purpose of enforcing payment of a fine imposed for violation of The Canada Temperance Act; and for want of goods to satisfy the distress, to commit the defendant to prison. See *Ex parte Pourier* (1); *Reg. v. Doyle* (2).

It may be mentioned that the 22nd section of the Imperial Summary Convictions Act, 11 & 12 Vic., cap. 43, from which, it may be presumed, the 67th section of the Dominion Summary Convictions Act was taken, authorises the inclusion in the

(1) 23 N. B. Rep. 544.

(2) 12 Ont. R. 347.

1891.

Ex parte  
SHEHAN.Allen, C. J.

warrant of commitment, of the costs of the commitment and conveying the defendant to prison, which the corresponding section of the Dominion Act does not.

The Act, 51 Vic., cap. 34, in amendment of The Canada Temperance Act, prescribes (*inter alia*) forms of convictions and warrants of commitment, in which the costs and charges of conveying the defendant to gaol are included; thereby, I think, recognizing the right to impose such costs. In the present case, the Justice has followed the form (T) in making his conviction.

It was objected that those forms, and section 66 of the Summary Convictions Act were only applicable where the Act imposing the penalty authorises the imposition of costs of commitment.

I think differently. All the provisions of the Summary Convictions Act are made applicable to prosecutions under The Canada Temperance Act. One of the provisions of the former Act (sec. 58) is, that "in every case of summary conviction made by a Justice, he may, in his discretion, award and order in and by the conviction, that the defendant shall pay to the prosecutor or complainant such costs as to the said Justice seems reasonable in that behalf, and not inconsistent with the fees established by law to be taken on proceedings had by and before Justices."

I think it is clear beyond doubt, that this section applies to prosecutions under The Canada Temperance Act. It is a general provision applicable to all summary prosecutions before magistrates where a penalty only is imposed. Paley on Conv. (6th ed.), 298.

Two cases, *Reg. v. Good* (1) and *Reg. v. Ferris* (2), were relied on by the defendant's counsel as deciding that a conviction under The Canada Temperance Act was bad, if it included the costs of commitment and conveying the defendant to gaol.

The first of those cases was a prosecution under The Indian Act, which provided for a penalty, "and the costs of prosecution in each case"; and it was held that those words did not authorise the inclusion in the conviction of the costs of com-

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(1) 17 Ont. R. 725.

(2) 18 Ont. R. 476.

mitment and conveying the defendant to gaol. See *Reg. v. Harshman* (1).

The other case, *Reg. v. Ferris*, was a prosecution for violation of The Canada Temperance Act, in which the conviction directed a distress for non-payment of the fine, and in default of distress, imprisonment, unless the fine and costs, including the costs of commitment and conveying to gaol, were paid. It was held that the conviction was bad for including the latter costs. The reason given for so deciding, being that section 66 of the Summary Convictions Act was not applicable, because the imprisonment there directed was to be "in the manner and for the time" directed by the Act on which the conviction was founded, and that The Canada Temperance Act did not direct any imprisonment for non-payment of a fine.

I read the words "in the manner," etc., as used in section 66, to mean that the party imprisoned is to be kept at hard labor, or otherwise, as the statute under which the conviction took place directed. I cannot, therefore, agree with the reasoning in *Reg. v. Ferris* (*supra*), which is contrary to the decision of this Court in *Ex parte Pourrier* (2).

It appears, moreover, by a recent case in the Queen's Bench Division of the High Court of Justice, in Ontario — *Mechiam v. Horne* — reported in the Canada Law Times of last month (3), that *Reg. v. Ferris* has been over-ruled; it having been decided in the recent case that under sections 62, 64, 66 and 67 of the Summary Convictions Act, there is power in convictions under The Canada Temperance Act in cases where no goods can be found to satisfy the distress, to award imprisonment until the fine and costs, including the costs of commitment and conveying the defendant to gaol, are paid. I entirely concur in that decision.

I think the rule *nisi* for a *certiorari* must be discharged.

KING, J. The question here is whether, upon a conviction under The Canada Temperance Act for a first (or second) offence, the payment of the costs and charges of commitment and of conveying defendant to gaol, may be made a condition

1891.

*Ex parte*  
SHEHAN.

Allen, C. J.

(1) 1 Puga. 317.  
(2) 23 N. B. Rep. 544.

(3) Since reported in 20 Ont. Rep. 267.

1891.

*Ex parte*  
**SHEHAN.**King, J.

of the release of the defendant within the term of imprisonment fixed by the conviction.

The Canada Temperance Act, R. S. C. cap. 106, sec. 107, (as amended by 51 Vic., cap. 34, sec. 9,) provides that "every offence against the second part of this Act may be prosecuted, and the penalties and punishments therefor enforced, in the manner directed by the Act respecting summary proceedings before Justices of the Peace, so far as no provision is hereby made for any matter or thing which is required to be done with respect to such prosecution; and all the provisions contained in the said Act shall be applicable to such prosecutions and to the judicial and other officers before whom the same are hereby authorized to be brought, in the same manner as if they were incorporated in this Act."

Sec. 53 of the Summary Convictions Act (R. S. C. cap. 178) provides that if the Justice convicts, or makes an order against the defendant, a minute or memorandum thereof shall then be made \* \* and the conviction or order shall afterwards be drawn up by the Justice, \* \* under his hand and seal, in such one of the forms of conviction (J 1, 2, 3,) in the schedule to this Act, as is applicable to the case, or to the like effect.

By sec. 14 of 51 Vic., cap. 34 (an Act in amendment of The Canada Temperance Act) it was enacted that the forms given in the schedule thereto, or any forms to the like effect, should be sufficient in the cases thereby respectively provided for. And in that schedule, forms of conviction were given for first, second and third offences under The Canada Temperance Act. These forms are designated (T), (U) and (V), respectively.

Where a statute gives a form of conviction not fully describing the offence, the conviction must nevertheless fully describe it. In that part, however, which awards the penalty or the like, the form may be followed, although it does not strictly comply with the requirements of the Act. Paley on Convictions 182, citing *Reg. v. Johnson* (1), *Barnes v. White* (2), and other cases.

In general it is sufficient, as it is safer, to follow the statutory form. Paley, 181.

Sections 58, 59, 60 and 61 of the Summary Convictions Act

(1) 8 Q. B. 102.

(2) 1 C. B. 192.

make provision for the awarding of costs of the prosecution or defence; and by sec. 60 the sums so allowed for costs are in all cases to be specified in the conviction or order, or order of dismissal, and the same are to be recoverable in the same manner, and under the same warrants, as any penalty, adjudged to be paid by the conviction or order, is to be recovered.

Accordingly, the forms of convictions under the Summary Convictions Act (J 1 and 2), and the forms of convictions under The Canada Temperance Act amendment Act, 51 Vic., cap. 34, (T and U), adjudge the forfeiture of the penalty and also the amount of costs to be paid by the defendant to the informant. And these forms direct that for failure forthwith to pay these several sums, i. e., the penalty and the costs, the said sums be levied by distress and sale of defendant's goods and chattels, and that in default of sufficient distress the defendant be imprisoned for the space of —, unless, etc.

At this point, the forms given under 51 Vic., cap. 34, differ somewhat from those under the Summary Convictions Act. The forms (J 1, 2) under the Summary Convictions Act, direct imprisonment for want of distress for the term of —, “unless the said sums (i. e. penalty and costs), and all costs and charges of the said distress, and of the commitment and conveying of the said defendant to gaol are sooner paid;” while in the forms (T) and (U), under 51 Vic., cap. 34, the imprisonment for want of distress is stated to be for the space of — “unless the said sums (i. e. penalty and costs), and the costs and charges of conveying the said defendant to gaol shall be sooner paid.” The difference is that the latter forms leave out the costs of distress, and omit the word “commitment.”

Now, it is argued that as the enacting clauses so far referred to, say nothing about the costs and charges of commitment and of conveying defendant to gaol, these latter cannot be awarded or adjudged against defendant simply because they are found in the forms of conviction; and *Reg v. Harshman*, (1) is relied upon. In that case the enacting clause allowed the costs of prosecution, and the form included costs of conveying to gaol; and it was thought that, having regard to the legislation of which the enactment in question was a codification or consoli-

1891.

*Ex parte*  
SHEHAN.

King, J.

1891.

*Ex parte*  
SHEHAN.King, J.

dation, and having regard to the directions contained in the form, it was intended that the form should be changed to suit the particular provisions of the statute to which it was to be applied.

But in the case before us, the enacting clauses of the Summary Convictions Act relating to warrants of commitment, authorize imprisonment within certain limits, "unless the costs and charges of the distress, and also the costs and charges of the commitment and conveying to gaol, as well as the penalty and costs of prosecution, are sooner paid."

Section 62 of the Summary Convictions Act provides that whenever a conviction adjudges a pecuniary penalty to be paid, \* \* and whenever, by the Act or law in that behalf, no mode of raising or levying the penalty or of enforcing the payment of the same is stated or provided, (which is the case under The Canada Temperance Act), the Justice, or any one of the Justices making such conviction, or any Justice in and for the same territorial division, may issue his warrant of distress (N1, N2), for the purpose of levying the same. By these distress warrants the reasonable charges of taking and keeping the distress are to be paid out of the property.

Section 66 then provides that if, at the time and place appointed for the return of any warrant of distress, the constable who has had the execution thereof, returns that he can find no goods or chattels whereon he could levy the sum or sums therein mentioned, together with the costs of or occasioned by the levy of the same, the Justice before whom the same is returned may issue his warrant of commitment (N5), directed to the same or any other constable, reciting the convictions shortly, the issuing of the warrant of distress, and the return thereto, and requiring the constable to convey the defendant to the common gaol or other prison of the territorial division for which the Justice is then acting, and there to deliver him to the keeper thereof, and requiring the keeper to receive the defendant into such gaol or prison and there to imprison him (or to imprison him and keep him at hard labor) in the manner and for the time directed by the Act or law on which the conviction mentioned in the warrant of distress is founded, unless the sum or sums adjudged to be paid, and all costs and charges of the distress, and also



the costs and charges of the commitment and conveying of the defendant to prison, if such Justice thinks fit so to order (the amount thereof being ascertained and stated in such commitment) are sooner paid.

1891.

*Ex parte*  
SHEHAN.

King, J.

In the form of warrant of commitment (N 5) the direction is to imprison the defendant for a term of———, “unless the said several sums, (that is, the penalty and costs of prosecution) and all the costs and charges of the said distress, (and of the commitment and conveying of the said A. B., to the said common gaol);” (these words being placed in parenthesis, as indicating that they may be inserted or omitted at the discretion of the Justice), “amounting to the further sum of ——, are sooner paid to you the said keeper.”

It is to be noted, however, that the 66th section of the Summary Convictions act does not apply to cases under The Canada Temperance Act, because, under section 66, the imprisonment is to be for the time directed by the Act or law on which the conviction is founded, and The Canada Temperance Act does not mention any time for such imprisonment. But the next section, the 67th, applies to cases under The Canada Temperance Act. It declares that whenever the Act or law on which the conviction is founded provides no remedy in case it shall be returned to a warrant of distress thereon that no sufficient goods of the defendant can be found, the Justice to whom such return is made, or any other Justice in and for the same territorial division (in this respect going further than the 66th section), may, if he thinks fit, by his warrant as aforesaid commit the defendant to the common gaol or other prison of the territorial division for which such Justice is acting for any term not exceeding three months.

In *Reg. v. Ferris* (1), it appears to have been thought that while this section extends to cases under The Canada Temperance Act, it does not provide for payment of the costs of commitment and conveying to gaol as a condition of discharge from imprisonment during the three months; but as the section provides that the Justice (or any other Justice of the territorial division) may, by his warrant as aforesaid, commit the defendant for any term not exceeding three months, these words

(1) 18 Ont. R. 476.

1891.

*Ex parte*  
**SHEHAN.**King, J.

would seem to carry down all the provisions of section 66 relative to the contents, form and operation of the warrant of commitment so far as applicable, as well those relating to costs and charges of distress and of commitment and conveying to gaol as the costs of the prosecution and the penalty. Form (N5), mentioned in section 66, closely follows the enactments of the section, and the "aforesaid warrant" referred to in section 67, clearly applies to the form (N5), except so far as it may be inconsistent with section 67.

In the schedule to the Act 51 Vic., cap. 34, a form (W) is given as a form of warrant of commitment under The Canada Temperance Act. It is very carelessly and ignorantly drawn. It recites that defendant was adjudged to pay the penalty and to be imprisoned, without alleging adjudication or order of distress warrant, and it recites the adjudication of imprisonment as being with hard labor, whereas hard labor is not permissible in such case.

It is true that the sections of the Summary Conviction Act to which reference has been made — the 66th and 67th — relate not to the conviction, but to the form, operation and effect of a warrant of commitment. But when there is this legislative authority, by sections 66 and 67 for the imprisonment of a defendant for three months, unless the costs of distress and of commitment and conveying to gaol, as well as the penalty and costs of prosecution are sooner paid, and when this follows upon and as a consequence of a conviction, I can see no objection to the conviction following a prescribed form, in which such costs are directed to be paid. As to the costs of prosecution, the amount of these is to be adjudged in the conviction. This is the judicial act of the convicting Justice. As to the charges and costs of distress, and of commitment and conveying to gaol, the amount is not to be named in the conviction. This amount cannot then be determined, and the form recognizes this fact. The amount is to be named by the Justice issuing the warrant of commitment.

It is true that the form of conviction adjudges the costs of commitment and conveying of the defendant to gaol, without fixing the amount, while the Act (sec. 66) authorizes the Justice issuing the warrant of commitment to order such costs if

he shall see fit; but the form of conviction (J 1) places in parenthesis the words "(and of the commitment and conveying of the said A. B. to the said gaol)," as if in recognition of the provisional character of such adjudication. Even although the adjudication or award of execution be not, in strictness, an essential part of the conviction, no harm can come to the defendant from following the form of conviction given in the statute, for the adjudication of execution, as given in the form of conviction, does not (so far at least as regards the point here in question) go beyond that which the law allows to be done upon the execution of such conviction, and so at most, it would be surplusage; and in Paley on Convictions, 180-1, it is said that the general maxim applicable to all other legal forms is applicable to convictions as well, viz., that any defect in the manner of stating that which is in itself surplusage, and which might be omitted altogether, does not vitiate the rest which is sound. I do not, however, intend to imply that anything which is authorized by the forms of conviction in respect of the adjudication of execution is surplusage.

1890.

*Ex parte*  
SHEHAN.

King, J.

The result, therefore, in my opinion is, that the conviction in question is supported by legal enactment, and is not open to the objection taken to it.

The recent case in Ontario — *Mechiam v. Horne* — referred to by counsel, appears from the note of the decision in the Canada Law Times, to be an authority to the same effect.

TUCK, J. I agree.

WETMORE, PALMER, and FRASER, JJ., took no part.

*Rule discharged.\**

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\* See *Reg. v. White*, 28 N. B. Rep. 216.

1892.

## EX PARTE WHALEN.

February 12.

*Canada Temperance Act—Conviction—Costs of commitment and conveying defendant to gaol—Costs of distress.*

In a conviction under The Canada Temperance Act for a first offence of unlawfully selling intoxicating liquor, the costs of commitment and conveying the defendant to gaol if the fine and costs are not levied by distress are in the discretion of the Justice under sec. 66 of The Summary Convictions Act.

Where such costs are not awarded, they should not form part of the conviction in the form (J 1) given by the Summary Convictions Act, which admits of variance.

Form (T) given by the Act 51 Vic. cap. 34, is not applicable to a case where the Justice does not adjudge payment of the costs of commitment and conveying the defendant to gaol.

The costs of a distress are not in the discretion of the Justice under sec. 66 of the Summary Convictions Act.

This was an application for a *certiorari* to remove a conviction of the applicant, John Whalen, had before George H. Wallace, Stipendiary Magistrate in and for the County of Kings, for selling intoxicating liquors contrary to the provisions of the second part of The Canada Temperance Act.

The objections to the conviction were: 1. That the Magistrate had agreed, after the evidence was finished, to adjourn for giving his judgment till a future day, after the trial of two other cases that were then pending before him.

2. That the conviction was defective, in that the Magistrate should have followed the form of conviction prescribed by the Act 51 Vic., cap. 34, in amendment of The Canada Temperance Act; and not the form prescribed by the Summary Convictions Act, (Rev. Stat. Can., cap. 178.)

An order *nisi* having been granted by His Honor Mr. Justice Palmer,

January 29, 1892, A. S. White shewed cause. The Magistrate not having adjudged the defendant to pay the costs of his commitment and the conveying of him to gaol, properly adopted the form of conviction (J. 1) given in the Summary Convictions Act (R. S. C., cap. 178), omitting the words, "and of the commitment and conveying the defendant to gaol."

These costs are discretionary with the Magistrate. Sec. 66 of the Summary Convictions Act provides that if the Justice thinks fit, such costs may also be imposed. Not having imposed them, they are rightly omitted from the conviction. Form (T) given in Act 51 Vic., cap. 34, is therefore not applicable. Rev. Stat. Can., cap. 106, sec. 107. See also *Reg. v. Manery* (1). As to the objection that the costs of distress were included, these costs necessarily follow upon the issuing of the distress warrant, which, under secs. 66 and 67 of the Summary Convictions Act, the Magistrate must issue before he can enforce the conviction by imprisonment of the defendant. Form (T) cannot be adopted in a case like the present.

1892.

*Ex parte*  
WHALEN.

*A. I. Trueman*, in support of the rule. Sec. 107 of The Canada Temperance Act (R. S. C., cap. 106), only makes the provisions, including the forms, of the Summary Convictions Act applicable so far as no other provision is made. Act 51 Vic., cap. 34, in amendment of the Canada Temperance Act, provides a form of conviction, and it must be adopted. Sec. 14 of the Act in amendment of the Act (R. S. C., cap. 106,) on which the conviction is founded, has, by authorizing the use of form (T), in effect, provided a mode of levying the penalty, and it must be followed. Secs. 62 and 67 of cap. 178, Rev. Stat. Can. See *Ex parte Shehan* (2).

*Cur. adv. vult.*

The judgment of the Court (WETMORE, J., taking no part,) was now delivered by

SIR JOHN C. ALLEN, C. J. The objections to the conviction in this case are,

1st. That the magistrate had agreed, after the evidence was finished, to adjourn for giving his judgment till a future day, after the trial of two other cases that were then pending before him.

2nd. That the conviction was defective, in that the magistrate should have followed the form of conviction prescribed by the Act 51 Vic. cap. 34, in amendment of The Canada

(1) 19 Ont. R. 601.

(2) Ante p. 133.

1892.

*Ex parte*  
WHALEN.

Temperance Act, and not the form prescribed by The Summary Convictions Act (R. S. C., cap. 178).

On the first point, we think the objection is sufficiently answered by the affidavits read on shewing cause against granting a *certiorari*.

The second objection is the substantial one.

Section 107 of The Canada Temperance Act, (Rev. Stat. cap. 106) as amended by 51 Vic. cap. 34, sec. 9, enacts as follows:—  
“Every offence against the second part of this Act may be prosecuted, and the penalties and punishments therefor enforced, in the manner directed by the ‘Act respecting summary proceedings before Justices of the Peace,’ so far as no provision is hereby made for any matter or thing which is required to be done with respect to such prosecution; and all the provisions contained in the said Act, shall be applicable to such prosecutions, and to the judicial and other officers before whom the same are hereby authorized to be brought, in the same manner as if they were incorporated in this Act, and as if all such judicial and other officers were named in the said Act.”

In order to shew the application of the above section to the present case, it will be necessary to state that this was a prosecution for an offence against the second part of The Canada Temperance Act (illegally selling intoxicating liquors), and that there is no provision in that Act with respect to the mode of prosecuting such offences and enforcing convictions, except as to the officials before whom such prosecutions are to be brought, and the limitation of the time for commencing them.

The conviction in this case was according to the form (J 1) given by the Summary Convictions Act, omitting the costs of a commitment and conveying the defendant to prison in default of sufficient distress to pay the fine and costs.

Section 111 of that Act declares that the several forms in the schedule of the Act, varied to suit the case, or forms to the like effect, shall be deemed good, valid and sufficient in law.

The only variance between the conviction in this case and the form (J 1) is the omission of the words “and of the commitment and conveying of the said (defendant) to the said gaol;” but those words in the form are within parenthetical

marks, as are also the words "to be kept at hard labor:" thereby showing that they are not to be used in every conviction for enforcing a penalty. 1892.

*Ex parte*  
WHELEN.

The penalty for a first offence of unlawfully selling intoxicating liquors is a fine of not less than \$50; but as no mode is provided by The Canada Temperance Act for the recovery of the fine, it is necessary to resort to The Summary Convictions Act for that purpose; and the 62nd section declares that whenever by the Act authorizing a pecuniary penalty for an offence, no mode of enforcing payment of the penalty is provided, the Justice making the conviction may issue his warrant of distress for the purpose of levying the same. The form of the warrant is given. Then section 66 points out what is to be done if no property can be found whereon to levy the fine and costs: it authorizes the Justice who issued the warrant of distress, to issue a warrant of commitment requiring the constable to arrest the defendant and convey him to the common gaol of the county, and to deliver him to the keeper, and requiring the keeper to imprison the defendant and to detain him for the time directed by the Act on which the conviction was founded, unless the sums of money adjudged to be paid, and all costs and charges of the distress, "and also the costs and charges of the commitment and conveying the defendant to prison, *if such Justice thinks fit so to order* (the amount thereof being ascertained and stated in such commitment), are sooner paid."

The Justice before whom the defendant in this case was convicted, did not "think fit to order" the payment of those costs, and, therefore, they were rightly omitted from the conviction.

But it was contended on behalf of the defendant, that the magistrate should have followed the form of conviction (T) given by the Act 51 Vic., cap. 34, and adjudged that the defendant should be detained in prison for the time specified, unless the costs of conveying him to gaol, as well as the other costs mentioned in the conviction were sooner paid.

Section 14 of the last mentioned Act declares that "The forms given in the schedule to the Act (of which form (T) is one) or any forms to the like effect, shall be sufficient in the

1892. cases thereby respectively provided for; and where no forms  
*Ex parte* are prescribed by the said schedule, new ones may be framed  
WHALEN. in accordance with 'The Canada Temperance Act,' or with  
'The Summary Convictions Act.'"

Apart from any objection to the use of the form (T), we do not think section 14 is imperative on the magistrate to use that form on a conviction for a first offence under the second part of the Canada Temperance Act, unless he has, in the exercise of his discretion, as given by section 66 of the Summary Convictions Act, adjudged that the defendant should pay the costs of commitment and conveyance to prison.

Section 14 does not even profess to repeal the forms prescribed by the Summary Convictions Act, which are made applicable to prosecutions under the Canada Temperance Act, and to substitute other forms; and therefore we do not see the necessity for form (T), because the form of conviction (J 1) in the Summary Convictions Act, in terms, provides for cases where the Magistrate adjudges the payment of the costs of commitment and conveying the defendant to prison, as well as to cases where he does not so adjudge. If by the form (T) it was intended to take away the discretion given to the Magistrates over the costs of commitment, etc., by section 66 of the Summary Convictions Act, we think it has entirely failed in its object.

In addition to the objection that the present conviction did not follow the form (T) in respect to the costs of commitment, it was also objected that it varied from that form by including the costs of a distress, which were not authorized by that form. In other words, that the conviction was wrong in two particulars — first, that it improperly included the costs of a distress, and second, that it improperly omitted the costs of a commitment and conveying the defendant to prison.

In answer to that objection, it is sufficient to say that it is evident that form (T) is not applicable to the present case, where the Magistrate was required by section 66 of the Summary Convictions Act, in case no property was found whereon to levy for the amount stated in the warrant of distress, to issue his warrant of commitment directing the defendant to be imprisoned for a certain time unless the fine and costs



adjudged to be paid, "and all costs and charges of the distress" were sooner paid. If the Magistrate, in drawing up his conviction in such a case as the present, should omit those words, the conviction would be defective, as he has no such discretion over those costs, as he has over the costs of commitment and conveying the defendant to gaol.

1892.  
*Ex parte*  
WHALEN.

The words "the said sums," in the latter part of form (T), where the imprisonment is adjudged, evidently apply only to the amount of the fine and the costs of the conviction.

We express no opinion as to whether that form can be properly applied in all cases of convictions for first offences under The Canada Temperance Act.

It may be, that the language of sec. 14 of the 51 Vic., cap. 34, would give the convicting magistrate power to vary from the form (T), when such form would not be in accordance with the conviction in respect to the payment of the costs of distress, or the costs of a commitment and conveying the defendant to gaol. In other words, that form (T) is not imperative, and may not be applicable in all cases, but might be varied so as to agree with the adjudication in each particular case of a conviction for a first offence.

*Shehan's Case*, decided in Hilary Term, 1891, (1) was cited to shew that the costs of commitment and conveying the defendant to prison should have been included in this conviction. But, in that case, the convicting Magistrate had adjudged that the defendant should pay those costs, and, therefore, they were properly included in the conviction; which fact certainly distinguishes it from this case.

We think the order *nisi* for a *certiorari* should be discharged.

*Rule discharged.*

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(1) Ante p. 133.

1890. DRISCOLL v. THE MAYOR, ALDERMEN AND COMMON-  
 April 16. ALTY OF THE CITY OF SAINT JOHN.

*Municipal Corporation—Sidewalk constructed on inclined plane—  
 Whether properly constructed—Foot passenger slipping on ice—  
 Negligence—Question for jury.*

A sidewalk was constructed on a street in St. John running from east to west, a distance of 480 feet on a grade of about 8 feet in 100 feet. From the south line of the street the sidewalk also sloped northward to the gutter in various grades—at one point the slope being about one foot in eight. At this point, water from the land south of the street (which was higher than the sidewalk) was accustomed to run across the sidewalk to the gutter, and to freeze in winter and form ice on the sidewalk. The plaintiff, in walking upon the sidewalk at this point in the evening, slipped upon the ice and was injured. In an action against the city for damages, a nonsuit was granted on the ground that there was no evidence of negligence:

*Held*—per ALLEN, C. J., PALMER and KING, JJ., (FRASER and TUCK, JJ., dissenting)—That there was evidence which should have been left to the jury to find whether the defendants had been guilty of negligence in the construction of the sidewalk.

This was an action brought to recover damages for injuries sustained by the plaintiff from slipping and falling while walking upon one of the streets of the City of Saint John, by reason of the alleged negligence of the defendants in improperly constructing the sidewalk of the street, so as to give it an unnecessary incline from the inside towards the gutter.

At the trial, which took place at the Saint John Circuit, in November, 1888, His Honor Mr. Justice Fraser, the presiding Judge, was of opinion that there was no evidence of negligence on the part of the defendants to be submitted to the jury, and directed a nonsuit.

The evidence given on the trial is so fully referred to in the judgments that it is unnecessary to state it here.

October 4, 1889. *Lee* moved to set aside the nonsuit. The learned Judge was wrong in deciding that there was no evidence to submit to the jury that the sidewalk, where the plaintiff fell, was improperly constructed. It was shown that the sidewalk was put down by the defendants so that there was a steep incline towards the gutter. This of itself is some evidence of negligence, as sidewalks are not usually nor ordinarily laid in that manner. The sidewalk having a slope, the

water, in running across it in the winter season from the alley which was shown to exist, froze and formed a smooth and very dangerous surface to persons passing over it. It is also submitted that it is the clear duty of the defendants to keep the streets free from ice, and that ice being on the sidewalk is *prima facie* evidence of negligence. It is especially their duty when the sidewalk is so constructed that ice will of necessity form on it, and when ice would not form if the sidewalk was constructed in the usual way. See *Burns v. City of Toronto* (1); *Goldsmith v. City of London* (2); *Bliss v. Boeckh* (3); *Taylor v. City of Yonkers* (4).

1890.

DRISCOLL

v.  
THE MAYOR,  
& C., OF THE  
CITY OF SAINT  
JOHN.

*Jack*, contra. The defendants, in constructing the sidewalk at the place where the accident happened, acted in the exercise of their discretionary powers given them by the charter of the city, and are not liable in respect to the same for error in judgment, if any. *Pattison v. The Mayor, etc., of Saint John*; *Morrill on City Negligence*, pp. 82, 116, 124 and 157. The evidence, however, shows that they exercised a sound discretion in constructing this sidewalk, inasmuch as it was so constructed that the water flowing from the alley would be carried directly to the gutter, and an overflow for a more extended area down the sidewalk avoided. It was not proved that the defendants had notice of the alleged defect before the accident to the plaintiff, nor that ice had previously formed at the place. The cases relied upon by the plaintiff are not applicable. *Goldsmith v. The City of London* (5) has been overruled by the Supreme Court of Canada.

*C. N. Skinner, Q. C.*, in reply.

*Cur. adv. vult.*

The following judgments were now delivered :

TUCK, J. At the trial of this cause in Saint John, the plaintiff was nonsuited.

This is an action of negligence. The plaintiff, a woman about seventy-eight years old, on the night of the 5th day of

(1) 42 U. C. Q. B. 500.  
(2) 11 Ont. R. 26.  
(3) 8 Ont. R. 451.

(4) 59 Am. Rep. 492.  
(5) 16 Can. S. C. R. 231.

1890.  
DRISCOLL  
v.  
THE MAYOR,  
&C., OF THE  
CITY OF SAINT  
JOHN.  
Tuck, J.

November, 1887, on her way home from the market, fell on the sidewalk on Union Street, near Dock Street, in the City of Saint John. Plaintiff's counsel contend that at this place the sidewalk was improperly constructed, having too steep a grade from the houses to the gutter. It is admitted that in absence of constructural defect in making the sidewalk the City is not liable.

From the evidence of William Murdoch it appears, that he took levels and measurements of the sidewalk where the accident happened, and obtained cross sections of the sidewalk at different points between Prince William Street and Dock Street. The result of this witness' measurement shewed that the descent of this sidewalk in front of the hotel door is three inches to eight feet out, that is, it slopes three and one tenth in one hundred. He says that just at the western side of the alleyway it slopes in six feet at the rate of thirteen and three-tenths in the hundred; that is, the difference there is about nine and three quarter inches, that is, on a straight line from the gutter, and at right angles to the street across the sidewalk; that water flowing from this alleyway flows across the sidewalk to the gutter. On cross-examination he says that this water would find the gutter in the most rapid way, and would be in the most direct course. This sidewalk is laid with asphalt, and thick ice had formed on it recently, at the place where the woman fell, from water coming out of the alleyway.

Now in this case there is no evidence that the street or sidewalk was out of repair. So far as the evidence shows, they were in a good state of repair: true, there was on the sidewalk, ice, which had probably formed the day or evening of the accident, and of which the defendants had no notice, and for which they were in no way responsible. In a city like Saint John, ice must necessarily form in the streets, and many of them, such as Rocky Hill and Chipman's Hill, are so steep, that in certain conditions of the weather, it would be practically impossible to keep them free from ice. Wherever asphalt sidewalks are laid, and water lodges on or runs across them in the winter season, ice forms, which renders the sidewalk slippery, and in a manner unsafe; but there is no law

which imposes upon a municipal body the duty of keeping asphalt sidewalks free from ice, or prevent them being laid. It is argued that the ice formed here because the sidewalk was so steep from the line of the houses to the gutter. Owing to the formation of the ground at this place the sidewalk could not very well have been differently constructed. The alleyway is about eight feet wide, and slants upwards towards the south, rising, as the witness says, considerably. The incline is greater than it is on the sidewalk. The whole of Union Street at this place has been cut down through the rock, thereby leaving the land immediately to the south of the street itself, higher and steeper than the sidewalk. And the plaintiff says, because in one place the sidewalk slopes three and one-tenth inches in one hundred, and just at the western side of the alleyway it slopes thirteen and three-tenth inches in the hundred, it is improperly constructed, and the defendants are responsible for any accident which is caused by ice. I differ entirely from this, and think that the construction of the sidewalk in the manner described by Murdoch, was not proper evidence to be submitted to the jury, of neglect on the part of the City Corporation of any legal duty, and therefore that the learned judge was right in granting a nonsuit. In this particular, I agree with the judgments of Sir W. J. Ritchie, C. J., and Gwynne, J., in *City of London v. Goldsmith*.

Apart from this view of the case, which to my mind is conclusive, there is no evidence that the ice formed on the sidewalk because of the slope; and it does not appear but that more ice would have formed had the sidewalk been level. There was to be sure, a greater liability to slip on a sloping sidewalk than on a level one, but for the slope in a city like Saint John, the defendants are not responsible. In *Ringland v. City of Toronto* (1), Gwynne, J. says, "unless the corporation could be held to be insurers of the safety of all persons using the sidewalk in the midst of our Canadian winter, I do not well see how they can be held responsible on this evidence." That language appears to be applicable to this case.

I think that the nonsuit should stand.

1890.

DRISCOLL

THE MAYOR,  
&C., OF THE  
CITY OF SAINT  
JOHN.

Tuck, J.

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(1) 23 U. C., C. P. 98.

1890. KING, J. This is an action for injuries sustained by the plaintiff, through slipping and falling while walking upon one of the streets in the City of Saint John. At the trial the plaintiff was nonsuited, and she now moves to set aside the nonsuit and for a new trial.

DRISCOLL  
v.  
THE MAYOR,  
&C., OF THE  
CITY OF SAINT  
JOHN.

The accident took place on the evening of November 5, 1887. The plaintiff, who was then seventy-seven years old, was returning from the market to her home when she fell. The injury to her was a serious one, her thigh was broken and she suffered considerable pain. There was nothing in the evidence to show conclusively that there was any carelessness on her part, and so, for the purposes of this motion, we are to assume that the accident happened without any fault of her own. This serious injury thus being occasioned to her without any fault on her part, the question is whether there is any evidence that it was occasioned by any neglect on the part of the defendants.

It has been frequently held that the corporation of the City of Saint John is bound to have the streets of the city in a state reasonably fit for ordinary travel. The accident here took place on the south side of Union street, between Prince William street, (or Chipman's Hill, as that street is called at this place) and Dock street. The street descends from Prince William street westward to Dock street at the rate of about eight feet in a hundred, the distance between these two points being four hundred and eighty feet. This part of the street was cut down to its present level and graded since the fire in 1877. The south sidewalk, which is laid in asphalt, has an incline from the line of the street towards the gutter. This incline, at the line of intersection with Prince William street and Dock street, is almost imperceptible in order to make a level connection with the sidewalk on those streets, but along the south side of Union street, between the intersecting streets, the sidewalk inclines towards the gutter at varying angles. A plan is in evidence showing the cross sections of the sidewalk at several points. At a point 145 feet west of Prince William street the sidewalk slopes  $3\frac{1}{2}$  inches in 8 feet, or four and three-tenths per cent., and then is rounded down to the gutter. At 272 feet it slopes 3 inches in 8 feet, or three and one-tenth

per cent. At 308 feet it slopes  $11\frac{1}{2}$  inches in 9 feet, or thirteen and three-tenths per cent. and then slopes abruptly to the gutter. At 400 feet it slopes  $5\frac{1}{4}$  inches in 9 feet, or five and three-tenths per cent. It will thus be seen that it is quite flat laterally at 272 feet, and quite steep at 308 feet. The cross section at 272 feet is at the door of the Sackville Hotel, i. e., at the east of the hotel building. To the west of the hotel-building there is an alleyway, and the cross section at 308 feet, namely that showing the incline of thirteen and three-tenths per cent. is taken at the west of this alleyway. The case for the plaintiff is that water was accustomed to come down this alley and run across the sidewalk, that this would freeze and make ice, and that, as this was reasonably to be foreseen, the City was guilty of carelessness in giving to the sidewalk a degree of incline or slope outwards that would make it dangerous in the event of the ice forming. Mr. *Jack* contends that the Legislature, having given the City the right to decide upon the matter of levels, etc., it should not be left to a jury to review their decision unless their determination is obviously bad. The right of the City in the matter of altering levels is fairly established by Patterson against the City of Saint John. I agree that the reasons which lead the City to make the levels at one grade rather than at another are reasons which are not to be reviewed on light grounds. Of course the power is given to the City for the purpose of making the highways more convenient and safe for travel. If then what is done has the effect of making a nuisance, or of making the highways dangerous to travellers, which is the same thing, the City cannot be said to be exercising powers given to them, for it is clearly not intended in the grant of power that they shall make a nuisance.

It is a little difficult to understand the extraordinary changes of levels shown by the plan in evidence. Most people have not a very accurate notion of form, and persons unaccustomed to plans might think from looking at the plan alone that the grade is greater than it may look upon the ground. Such a question as arises here is one of degree. A grade might be such that no reasonable person would say it is too great, or it might be such that any reasonable person would say it is too great for ordinary travel. In this case it seems to me to be on the border line.

1890.  
 DRISCOLL  
 v.  
 THE MAYOR,  
 &C., OF THE  
 CITY OF SAINT  
 JOHN.  
 —  
 KING, J.  
 —

1890.  
DRISCOLL  
THE MAYOR,  
&C., OF THE  
CITY OF SAINT  
JOHN.  
King, J.

There is some difficulty perhaps in determining from the evidence just where the accident occurred. The plaintiff says that her feet got "into the dangerous place near the hotel"; she also says "it was the sloping place where I fell, there is a channel there where the sidewalk delves and where I was heaved down." Her son who found her lying where she fell says "it was just where this cut was" (*i. e.*) the cut through the rock forming the alleyway, "at the entrance from the side of the Sackville Hotel, there is a kind of platform there outside where the carts cross, it was a few steps from that alleyway where I found her, it was by that place." From this I think we may well come to the conclusion that she fell in front of the alley upon the steep incline, and that the surface of the sidewalk at this place was depressed below the surface on either side. Unless this were so it is not easy to understand the force of the contention for the defendants that the sidewalk was made in this fashion in order to carry the water directly to the gutter from the alley and prevent it flowing down the surface of the street. The evidence of Michael Driscoll, Ann McCarthy, Mary McGill and Joshua Ward tends to show that the place was one which was rather difficult to travel upon when ice had formed there. Many places in St. John are necessarily so in winter; but there may well be a distinction between the operation of general causes and special causes, increasing the effect of the general operations of nature. I by no means wish to express any opinion as to there being any liability on the city to guard against the continuance of ice on the streets or sidewalks generally.

As to whether there was ice here at the time of the accident, the evidence is slight; the plaintiff does not speak of it. Her son, on direct examination, states that he did not notice it at the time; but on cross-examination he says there was ice, and it is positively proved by Ann McCarthy. Of course the defendants cannot be liable by reason merely of the fact of the ice being there. They could have no notice of it, and it is not suggested that they ought to have prevented it, or could have done so; but it is said that this being a place where there was a known flow of water upon the sidewalk, the defendants constructed the sidewalk in such a way as to en-



hance the danger, by giving it an undue lateral slope, so that a person could not safely walk there when the ice formed. Can we say, as a matter of law, or as a matter beyond all reasonable question, that this degree of slope was not such as to expose persons to an unnecessary risk, or that it was necessary for the purpose of leading off the water from the alleyway? May it not be that the water could have been carried away by a depression from the mouth of the alley to the gutter, having a less incline, or by the more gradual raising of the sidewalk across its full width below the alleyway? It does seem as if a surface sloping one foot in 12 lengthwise, and one foot in 8 laterally, and covered with ice might not be a very safe surface to walk upon after dark. At all events I think it would have been more satisfactory, if the case had gone on, and if the defendants had been put to showing by evidence the circumstances which led their local officials to construct the sidewalk in the way they did. In the absence of such evidence the jury might not unreasonably come to the conclusion that it was unnecessary to expose travellers to the risk (which I think it is impossible to say that they were not exposed to) from the use of a sidewalk such as this was proved to be. In *Goldsmith v. The City of London*, the Supreme Court of Canada divided upon the question as to the negligence involved in the elevation of a sidewalk a few inches above the level of the street crossing. The majority (reversing the decision of the Ontario Court of Appeal) thought there was no evidence of negligence. Each case depends upon its own facts and in each case the question is a practical one. I think this case a doubtful one, and have been much inclined to come to an opposite conclusion to that which I have expressed. Upon the whole, however, I think that the plaintiff has proved facts from which reasonable men might conclude that the street was not reasonably fit to travel upon under circumstances which might have been foreseen, and that unless there was a choice amongst evils (which it was for defendants to show) the street was not in a proper condition for travel.

As to its being reasonable to foresee the formation of ice, the fact that the defendants' counsel contends that the change of

1890.

DRISCOLL  
v.  
THE MAYOR,  
&C., OF THE  
CITY OF SAINT  
JOHN.  
King, J.

1890. grade was made for the purpose of carrying off the flow from the alley shows that the attention of the defendants was directed to this particular matter. I therefore think that the nonsuit should be set aside, and that there should be a new trial.

DRISCOLL  
v.  
THE MAYOR,  
&C., OF THE  
CITY OF SAINT  
JOHN.

King, J.

PALMER, J. This was an action tried before Mr. Justice Fraser, at the Saint John Circuit, who nonsuited the plaintiffs; and this is an application to set aside such nonsuit and for a new trial.

The facts on which the case rested are as follows: The defendants cut the street into the rock about 8 or 10 feet to lessen the grade of Union Street, where the land sloped westward along the street and southward across the street in its natural state. After the street was cut down, in making the sidewalk on the south side of the street, they cut it down so that it sloped from the southern extremity towards the carriage way at an angle of depression of  $13\frac{1}{16}$  in the 100 feet in some parts, and less in others; that this alteration in the elevation of the street made it below the land further to the southward, so that water falling thereon would run towards the street instead of, as before, from it, so that in the winter time the water so running and also falling upon the sidewalk, froze and formed ice which had quite a steep pitch westward along the street, and also a pitch northward towards the street of about one foot in eight. The female plaintiff walking along this sidewalk in the night time, slipped upon the ice and fell and injured herself, and the sole question in the case is, whether she has any cause of action against the defendants for such injury.

The charge is, that the defendants were guilty of negligence in improperly constructing the sidewalk, giving it an improper, dangerous and wholly unnecessary pitch to the northward, as above described. There was no contention that the defendants were liable merely because ice formed upon the sidewalk that made it dangerous. The question may hereafter arise if the defendants allow the streets to remain for a long time in a dangerous condition with ice formed upon them, whether it might not be their duty after notice of such

dangerous condition, to take some reasonable means to render them reasonably safe, if it could reasonably be done by putting sand or other material upon it to render it less dangerous. However that may be, it is clear that no such claim could arise in this case, for the accident happened before the city authorities could have had any notice of its dangerous condition, by reason of the ice having actually formed upon it. But the claim of the plaintiff is, that although the city are not answerable for the formation of ice, yet they are answerable for the construction and keeping of the streets in a reasonably safe condition for the public to use them, and that they are bound to so construct them as that the ordinary conditions of the weather that not only are likely, but that are sure to happen, should not render them more unsafe than is reasonably necessary within the means at their disposal. And I think the plaintiffs are right in that contention. What I mean is, I think it would be carelessness in a person to construct a street that would be perfectly safe to pass along in dry weather, and would be wholly unsafe in wet. Equally so, if it was unsafe with ice that was sure to form there, if it could be made less dangerous when the ice was formed, by some other equally convenient mode of construction. Applying this principle to the present case, there was no necessity for any considerable slope of the sidewalk toward the street; but there was a necessity for a slope westward along the street; and for the latter, as it could not be avoided, the defendants, in my opinion, are not answerable.

The slope to the northward, at all events anything like the fall of one foot in eight, was entirely unnecessary; and if that rendered the street when covered with ice more dangerous, then there was evidence that it had been carelessly and negligently constructed. Now common knowledge teaches us that level ice is much safer to walk on than ice on a slope; and I think that a slope to one side is very much worse than one directly in front of persons walking. The reason is, that a person can sustain himself very much easier in walking out of a perpendicular line to the front than towards his side. I therefore think that whether this sidewalk was or was not negligently and improperly constructed, was a question for the jury,

1890.

DRISCOLL  
v.  
THE MAYOR,  
&C., OF THE  
CITY OF SAINT  
JOHN.

Palmer, J.  
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1890. as was also the question whether such improper construction  
 DRISCOLL was the cause of the injury; for if so the defendants are liable.  
 v. I therefore think that the nonsuit should be set aside and a  
 THE MAYOR, &c., OF THE new trial granted.  
 CITY OF SAINT JOHN.

Palmer, J.

No doubt questions of this kind are greatly questions of degree. In judging whether there was evidence of negligence in any particular case the rule of law is plain enough, and it is this: Has the defendant done the work in the manner that a prudent man ought to have done it, having regard to his own duty to the public, and the probable effect of what he has done? In this case, the defendants knew when they made this sidewalk that it was not only highly probable, but almost certain, that at times it would be covered by ice; and while it might not be their duty to make it safe in such a condition under all circumstances, because in the nature of things owing to the natural descent of the land, that might not be reasonably possible, yet it appears to me when they could make the contour of the ground safer in one way rather than another, they ought to choose that which would be the best. A prudent man, it appears to me, would do this; and, therefore, if the jury think that they have not done it; they have a perfect right, in my opinion, to find them guilty of negligence. But it is said that even if the defendants were guilty of negligence, and the street was more unsafe, and more difficult to pass because of such negligent construction, still it was not proved that the accident was occasioned thereby, because the plaintiff might have slipped on the ice even if the slope had not been in the sidewalk. Of course that is a question to be found by the jury. If they are not satisfied that the accident would not have happened without such slope, then they should find for the defendant; but to yield to such an argument, and decide in point of law that there was no evidence in such a case, would, it appears to me, defeat every action for negligence. For if a man put anything in the highway, and another's carriage overturned by running against it, it might be that the same thing would have happened if it was not there at all; all the evidence would show, is that it was more dangerous by reason of it being there, and, consequently, more likely to happen, and that it did happen. Again, it is argued that the ice

was the proximate cause of the accident, and the improper construction of the street too remote. The case cited at the bar settles that question. Surely it cannot be pretended that if a person makes a place that would be dangerous when the rain falls, he would be relieved of his liability because some time elapsed between the making of the place and the falling of the rain. Here, if this plaintiff was injured because the sidewalk was improperly constructed, though the injury would not have happened unless ice had formed upon it, and would not have happened if the ice had a less slope—when the ice must form in the nature of things, the real cause of the injury is the improper construction of the street.

1890.  


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 DRISCOLL  
 v.  
 THE MAYOR,  
 &C., OF THE  
 CITY OF SAINT  
 JOHN.  


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 Palmer, J.  


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FRASER, J., agreed that the nonsuit should stand.

Sir JOHN C. ALLEN, C. J., thought that there was some evidence to go to the jury, and that there should be a new trial.

*New trial granted.*

1890.

## EX PARTE BAIRD.

*February 13.*

*Dominion Elections Act, 1874 — Nomination paper and deposit — Acceptance by Returning Officer — Power to reject after poll held — Recount of votes by County Court Judge — Prohibition to restrain Judge.*

The nomination paper required by "The Dominion Elections Act, 1874," sections 18, 19 and 21 (Rev. Stat. c. 8, sec. 21), need not be delivered to the Returning Officer, nor the deposit of \$200 be paid to him, by an agent of the candidate authorized in writing.

A nomination of a candidate, K., for the House of Commons, containing all the requisites of "The Dominion Elections Act, 1874," was duly delivered to the Returning Officer, the deposit paid to him, for which he gave a receipt, as required by sec. 19 of the Act. Another candidate, B., having been nominated, a poll was granted — the County returning but one member — and at the declaration of the several returns, it appeared that K. had the majority of the votes; but on B.'s objection that K. was not duly nominated, because his deposit was not paid by his duly authorized agent, the Returning Officer declared B to be elected. Application was then made by K. to the Judge of the County Court, who granted an order appointing a time for a recount of the votes, under sec. 64 of cap. 8, Rev. Stat. Can.

*Held* — That though the act of the Returning Officer declaring B. to be elected was illegal, it was not a matter for a re-count of the votes polled, within the jurisdiction of the County Court Judge under sec. 64, and that a prohibition would lie to restrain him from proceeding therein.

Per ALLEN, C. J., and WETMORE, J. (KING, J. *contra*), that the power of the Returning Officer to decide upon the sufficiency of K.'s nomination as a candidate, ceased when he accepted it, and granted the poll.

A Judge at Chambers has power to grant an order *nisi* for a prohibition returnable in Term, with a stay of proceedings in the meantime.

Upon motion of *L. A. Currey*, an order *nisi* was granted by His Honor Mr. Justice Tuck, on the ninth of March, 1887, calling on James Steadman, Esquire, the Judge of the County Court for the County of Queens, to shew cause at the following Easter Term of this Court why a writ of prohibition should not issue to prohibit him from in any way proceeding with, or making a recount or final addition of, the votes given for George F. Baird and George G. King, at the election held on the 22nd day of February then last past, of a member to represent the electoral district of the County of Queens, in the House of Commons of Canada, and from certifying the result of any such recount or final addition of votes to the returning officer of the said electoral district; and also directing that in the meantime, and until further order of this Court, all further

proceedings on or with reference to the said recount or final addition of the said votes, and such certificate of the result thereof should be stayed.

1890.

*Ex parte*  
BAIRD.

It appeared by the affidavits that in February, 1887, a writ had issued for the election of a member to represent the electoral district of Queens County, in the House of Commons of Canada; that the writ was directed to Mr. John R. Dunn, as returning officer; that the 15th of February was the day appointed for the nomination of candidates, and the 22nd for the polling day; that Mr. George G. King and Mr. George F. Baird were nominated as candidates on the 15th of February; that Mr. King's nomination was signed by upwards of twenty-five duly qualified electors of the district, and was also assented to and signed by him, and verified by the oath of Mr. T. Medley Wetmore, who also at that time paid to the returning officer the deposit of \$200, required by law, and that he then gave Mr. Wetmore a certificate stating that he had received from him a nomination paper of Mr. King, signed by upwards of twenty-five persons, and signed by Mr. King as consenting thereto, as proved by the affidavit of Mr. Wetmore, and that he had also received a deposit of \$200, as by law required.

A poll having been demanded an election was held on the 22nd of February, Mr. King and Mr. Baird being the candidates.

On the 5th March, the day fixed for declaring the result of the polling, the returning officer stated the number of votes given by each candidate at the several polling districts; but before announcing the result Mr. Baird's agent objected that Mr. King had not been legally nominated, the deposit of \$200 not having been made by his duly appointed agent; that all the votes given to him were therefore null and void, and should be rejected, and that Mr. Baird being the only candidate legally nominated, should be declared duly elected. The returning officer adopted this view and declared Mr. Baird duly elected, though it was admitted that Mr. King had the majority of the votes polled.

On the 7th March, an application on behalf of Mr. King was made to Judge Steadman, on an affidavit stating substantially the above facts, and also stating the belief of the deponent that

1890.

*Ex parte*  
BAIRD.

one of the deputy returning officers had improperly counted the ballots by keeping them concealed from the agents of the candidates, and that another deputy returning officer had improperly rejected one or more ballots in counting them.

On this affidavit an order was made by Judge Steadman appointing the 11th March, at the Court House in Queens County, as the time and place for making a final addition of the votes given at the election, and for recounting the votes. It was to stay the proceedings under this order that the order *nisi* for a prohibition was granted by Mr. Justice Tuck.

The grounds on which the order *nisi* was granted were:

1. That Judge Steadman had no jurisdiction to make the order which he did.
2. That if he had any jurisdiction in the matter he was attempting to act in excess of his jurisdiction in proposing to recount the votes.
3. That there was but one candidate legally nominated; and whether the returning officer acted rightly or wrongly in rejecting Mr. King's votes, an appeal from the decision could only be made to the Election Court.

April 16, 1888. *Geo. F. Gregory* now shewed cause. The Judge had no jurisdiction to make his order *nisi* with an interim stay, which was for the time a prohibition. If prohibition will lie, the procedure is by suggestion to the Court in Term time, or in vacation to the Court of Chancery. The practice is to be governed by what it was in the Courts at Westminster prior to 1 Wm. 4, cap. 21. This practice was followed in *Ex parte Allen* (1). The party applying for the writ must suggest what has been done in the Court below, and the suggestion must be verified by affidavit, and if untrue, the other party may move to quash. *Darby v. Cosens* (2); *Bishop v. Corbet* (3); Bac. Ab. "*Prohibition*" (A); *In re Bateman*, (4). The Local Act 49 Vic. c. 18, sec. 4, which declares the practice "when an application should be made to the Supreme Court, or a Judge thereof, for a writ of prohibition to be addressed to a Judge of a County Court," has no reference to

(1) 2 All. 424.  
(2) 1 T. R. 552.

(3) 1 Lev. 253.  
(4) L. R. 9 Eq. 660.



such proceedings as those sought to be prohibited in the present case, but to proceedings of County Courts in the ordinary administration of justice. The inserting of the words "or a Judge thereof," is not declaratory of the right of a Judge to grant the writ, and it can not be gathered from this provision that the Legislature intended to give a Judge such authority. Assuming, however, that section 4 is an enabling clause, it does not apply to proceedings in regard to an election, as that is a matter wholly without the jurisdiction of this Court. In the execution of the duties imposed upon him by the Dominion Elections Act, the County Court Judge is an election officer, accountable to the House of Commons, and not subject to the control or prohibition of this Court. The mere fact that his duties on a re-count and final addition of the votes are of a judicial character, would not make him an inferior Court subject to prohibition. The powers he was about to exercise must fall within the prerogative of some superior Court, before a prohibition would lie. See *Worthington v. Jeffries* (1); *Ellis v. Fleming* (2). Brett, J., in *Worthington v. Jeffries*, says: "The authorities shew that the ground of decision in considering whether prohibition is or is not to be granted, is not whether the individual suitor has or has not suffered damage, but is whether the royal prerogative has been encroached upon by reason of the prescribed order of administration of justice having been disobeyed." There is no prerogative of the Crown so far as elections are concerned, and there can be no infringement of the prerogative in an election Court. That a person exercises judicial functions is no test. The duties imposed upon the County Court Judge by the Elections Act, are not given to him as such Judge, but are given to the person filling that office. Under the provisions of the County Courts Act, one Judge may be called in to perform the duties of another. This could not be done in a proceeding in an election matter. In acting under the Elections Act, he is only aiding in the conducting of the elections, which is part of the duty of the Executive Government. It has been asserted that the Judicial Committee of the Privy Council may be restrained; see *Ex parte Smyth* (3); but it

1890.

*Ex parte*  
BATED.

(1) L. R. 10 C. P. 379.

(2) 1 C. P. D. 237.

(3) 2 C. M. &amp; R. 743.

1890. has never been done. Shortt on Informations, 439; *The Queen v. The Local Government Board* (1). Neither of the candidates has any personal right in the matter. The question is, have the electors had a proper opportunity of electing their representative. If the County Court Judge is subject to prohibition for excess of duty, then he is subject to mandamus to compel him to act to the extent of his duty. But a mandamus to a County Court Judge who had commenced a re-count and then declined to proceed, was refused in the *Centre Wellington Case* (2), on the ground that he was an officer of another jurisdiction and was not amenable to the Court. See also *Regina v. Prudhomme* (3). Even if there is a remedy by prohibition in election proceedings, the County Court Judge has jurisdiction over the subject matter by sec. 64 of the Elections Act, and in granting the summons for a re-count, he had not exceeded his jurisdiction. A sufficient affidavit had been presented to him, and under section 64 he was bound to appoint a time to re-count the votes or to make the final addition. If, on the return of the summons, the objections to his proceeding, now raised, had been raised before him, it must be presumed that if they are fatal to his jurisdiction he would have proceeded no further; and until he had exceeded his jurisdiction a prohibition will not lie. *Grant v. Sir Charles Gould* (4); *Holme v. Earl Camden* (5); *Ackerley v. Parkinson* (6); *Barker v. Palmer* (7); *Hallock v. Cambridge* (8); *Clerk v. Robson* (9); *Ex parte Smyth* (10); *Mackonochie v. Lord Penzance* (11); *Smith v. Mayor of London* (12); *Reg. v. Sir Travers Twiss* (13); *Ex parte Boyne*, per King J. (14).

But it is submitted that the County Court Judge has jurisdiction in the matter. All that the deputy returning officers had done in the counting of the ballots, and all that the returning officer had done in the summing up of the votes from the deputies statements were subject to his review. The affidavit stated that the deputy returning officers had improperly counted and rejected ballots, and that the returning

(1) 10 Q. B. D. 309.

(2) 44 U. C. Q. B. 132.

(3) 7 Can. L. T. 211.

(4) 2 H. Bl. 69.

(5) 4 T. R. 382; 2 H. Bl. 538.

(6) 3 M. &amp; S. 411.

(7) 8 Q. B. D. 9.

(8) 9 Dowl. 688.

(9) 1 H. Bl. 100.

(10) 3 A. &amp; E. 719.

(11) 6 App. Cas. 424.

(12) 6 Mod. 78.

(13) L. R. 4 Q. B. 407.

(14) 22 N. B. Rep. 228.

officer had refused to count the votes for Mr. King. Even if, as claimed, the decision of the returning officer was not subject to review, clearly the Judge had jurisdiction to correct the errors of the deputy returning officers. The duty of the returning officer on declaration day is to add together the ballots that have been counted by the deputy returning officers; and he is to get his information from their statements. He has no authority to question the votes themselves. He may reject a statement; but if he accepts it he must add its number to the numbers of all other accepted statements, and so arrive at his conclusion as to which candidate has a majority of votes, and make declaration accordingly. In the present case, the returning officer in effect refused to count or add up the votes for Mr. King, and that decision is subject to review. It is true the returning officer did not in words refuse to sum up the votes, but declared Mr. Baird elected on the ground that he was the only properly qualified candidate. The sufficiency of the nomination is decided when the returning officer grants a poll, and his decision is final for all purposes of the election, and he has no power on declaration day to reverse his decision. See *Reg. v. The Mayor of Bangor* (1), and on appeal (2). As to the deposit: The Act does not require the person presenting the nomination and making the deposit to be the duly appointed agent of the candidate. Sec. 121 of 41 Vic. cap. 6 does not refer to the deposit which is to accompany the nomination, but has reference to monies to pay the expenses. And the returning officer rightly decided on the nomination as to its sufficiency.

1890.

*Ex parte*  
BAIRD.

*L. A. Currey*, in support of the rule. This Court has followed the practice of a Judge granting an order *nisi* for a prohibition, like an order *nisi* for a *certiorari*, at chambers. Brett, J., in *Worthington v. Jeffries* (3), says the writ of prohibition is ordinarily granted out of Court by any one of the Judges in his chambers. In *Smeeton v. Collier* (4) it is decided that a single Judge has the same power as the Court. See *Ex parte Boyne* (5) and *Ex parte Currie* (6). If a single Judge has not this power, the object of the prohibition might

(1) 18 Q. B. D. 363.  
(2) 13 App. Cas. 241.

(3) L. R. 10 C. P. 379.  
(4) 1 Exch. 457.

(5) 22 N. B. Rep. 228.  
(6) 26 N. B. Rep. 408.

1890.

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*Ex parte*  
BAIRD.

be entirely lost. The proceeding by suggestion, is not necessary. It is sufficient if a full record is placed before the Court, either by suggestion or by affidavit. As to the deposit, the words of sec. 118, R. S. C., cap. 8, dealing with election expenses, are broad enough to include the deposit accompanying the nomination paper. If the deposit is paid by a person other than the duly appointed agent of the candidate, the returning officer could not legally hold it, in case it was claimed by the party depositing it. The provisions of the Act must be strictly complied with, and where the statute requires any act to be performed by a particular person, as it does the payment of the deposit, no other person can legally make such deposit. In such case the principle of *facit per alium facit per se* does not apply. The nomination of Mr. King was therefore invalid. But the question involved is not the correctness of the returning officer's decision on Mr. King's nomination on declaration day, but whether the same can be reviewed by the County Court Judge; or in other words, whether such Judge had any jurisdiction to act in the matter? It is claimed that the statute authorizes the returning officer to decide such a matter as he did determine, whenever called on to do so. Were this otherwise, the provisions of the statutes referred to would be meaningless. Those provisions clearly express an intention to authorize the returning officer to reject all the ballots cast for any person not legally a candidate. If this is a correct interpretation of the Act, then it must follow that the appellate jurisdiction conferred on the County Court Judge by section 64 will not include such a case as the present. And, if so, this Court has jurisdiction to grant a writ of prohibition to prohibit him from holding a recount of votes in a case over which the statute gives him no jurisdiction. This Court, exercising the functions of the Court of Queen's Bench in England, has a general superintendency over all other Courts of the land, and is bound to award a prohibition in all cases where an inferior tribunal, or even a superior Court of limited jurisdiction, is acting or about to act without or in excess of jurisdiction. Prohibition is a writ of right, and the Court is bound to issue it on fair and reasonable grounds being shown for it, and it will go to every tribunal or court

vested with judicial functions. High on Extraordinary Legal Remedies, 550; *Jackson v. Beaumont* (1); *Mayor of London v. Cox* (2); *Worthington v. Jeffries* (3); *James v. London & South Western Railway Co.* (4); *Quimbo Appo v. People* (5). It may even go to the Judicial Committee of the Privy Council. *Ex parte Smyth* (6).

1890.

*Ex parte*  
BAIRD.

A Judge of a County Court in holding a recount is exercising a statutory and limited jurisdiction. By sec. 64 of the Elections Act his authority to act is limited to cases where the returning officer has improperly summed up the votes, or deputy returning officers have improperly counted or rejected ballots. In this case, no such questions arose. There was no doubt or question raised as to the count, or as to who had the majority of ballots. The returning officer's decision turned entirely on the question of the sufficiency of Mr. King's nomination paper. If there was only one candidate, there could be no count. Now, whether the returning officer's decision was right or wrong, it could not be reviewed by the County Court Judge, whose jurisdiction is limited to the counting of the ballots, and until the judicial decision of the returning officer was reversed it must be taken that there were no ballots, and his decision on the nomination paper would be a subject matter for an election petition, and could only be confirmed or reversed by the Election Court under the provisions of the Dominion Controverted Elections Act, sec. 68. *Hardcastle on Election Petitions*, 1; *Leigh and LeMarchant's Election Law*, 190, 201; *Mather v. Brown* (7); *Monks v. Jackson* (8). The matter of a recount is a judicial proceeding, and therefore subject to prohibition. The Judge in holding a recount is merely reviewing the decisions of the returning officer and the deputy returning officers. Rev. Stat. Can. cap. 8, secs. 21—27, and cap. 13, secs. 1 and 2; *South Renfrew Case* [2] (9); *Ermatinger's Franchise Act & Election Law*, 347 and 348; *Ex parte McCleave* (10), per Palmer, J.; *Bushby's Manl. Proceed. of El.* (5 Eng. ed.), 67; *King's P. E. I. Case*, *Bourinot's P. P. & P. (Can.)*, pp. 126, 127 and 128 (ed. 1884); *Bothwell Case* (11), per Galt, J., and Gwynne, J.

(1) 11 Exch. 302.

(2) L. R. 2 H. L. 239.

(3) L. R. 10 C. P. 333.

(4) L. R. 7 Ex. 187.

(5) 20 N. Y. 531.

(6) 2 C. M. &amp; R. 748.

(7) 1 C. P. D. 596.

(8) 1 C. P. D. 683.

(9) 11 Can. L. J. N. S. 43.

(10) 21 N. B. Rep., 315.

(11) 8 Can. S. C. R. 676.

1890.

*Ex parte*  
BAIRD.

The County Court Judge in holding a re-count of votes is merely acting by virtue of a statutory authority the same as in ordinary cases in his court, and has no more right to exceed the limits of the statute in the one case than in the other; but if he does, the authority in both cases being of the same nature, and coming from like sources, prohibition must equally apply. If Judge Steadman could not be prohibited in the matter, even if acting without or in excess of jurisdiction, it must follow that the Judge of some other County Court, without the slightest shadow of jurisdiction, might hold a re-count of the votes and not be subject to prohibition. The County Court Judge is not in the same position in the matter as the House formerly was. Parliament conferred on the Judge, only a small and limited part of its power in such matters, and within such bounds only as the statute prescribes is he supreme. Even Parliament itself is supreme only within the limits of its own power. The question of delegated power cannot arise in this case, for even admitting it to be delegated, it is not sought to prohibit the Judge from exercising a power conferred upon or delegated to him, but one that he does not possess, namely, to decide on the validity of a nomination paper. *The Centre Wellington Case* (1), merely decides a mandamus would not be granted in that case, as there was another adequate legal remedy, namely, an Election Petition. Such reasoning does not apply to prohibition, which is a writ of right and one which the Court is bound to grant in all cases where any defect of jurisdiction is shown, whereas an application for a mandamus is one directed to the judicial discretion of the Court. The former is to prevent an unwarranted exercise of power; the latter to compel a judicial officer, having jurisdiction, to act in a particular case. The fact, therefore, that they are classed together in the *dictum* in that case, even admitting the *dictum* sound law as applied to mandamus, goes to show that the very great difference and clear distinction between them were not considered by that learned Judge, but that he only casually mentioned it as a supposed illustration of the proposition he was enunciating. The decision in *Reg. v. Price* (2), and the judgment of Gwynne, J., in the *Montmagny Election Case* (3),

(1) 44 U. C. Q. B. 132.

(2) L. R. 6 Q. B. 411.

(3) 15 Can. S. C. R. 1.

where he holds prohibition applies to an election Judge, are directly contrary to the *dictum* in the *Centre Wellington Case*. There it was decided that a mandamus would go to commissioners acting under a statutory authority and performing duties that formerly devolved on the Committee of Elections and Privileges of the House. The same argument, as in the Ontario case, was there advanced, but was not sustained. The English case, I submit, gives the correct exposition of the law.

1890.  
*Ex parte*  
 BAIRD.

Though the House of Commons may be the sole and absolute judge of all matters connected with its own internal procedure, a different rule prevails as to acts requiring to be done outside of the House. Even the House is confined to the exercise of its own powers. It could not claim to be supreme in cases where it exceeded its own jurisdiction. If it attempted to try a man for murder, could not the Courts interfere? There is a clear distinction between privileges and power as pointed out by Coleridge, J., in *Stockdale v. Hansard* (1); and in the case of *Bradlaugh v. Gossett* (2), Stephen, J., says: "In case of an usurpation of power the Courts could even interfere with the House of Commons."

*Cur. adv. vult.*

The following judgments were now delivered :

Sir JOHN C. ALLEN, C. J. This was an order made by Mr. Justice Tuck on the the ninth day of March, 1887, calling on James Steadman, Esquire, the Judge of the County Court of Queens County, to show cause at the next term of this Court why a writ of prohibition should not issue to prohibit him from proceeding with, or making a recount or final addition of the votes given for George F. Baird and George G. King, respectively, at an election held on the 22nd of February preceding, of a member to represent the electoral district of Queens County in the House of Commons of Canada; and from certifying the result of any such recount or final addition of votes to the returning officer of the said electoral district; and also directing that in the meantime, and until further order of this Court, all further proceedings on or with reference to the said

(1) 9 A. & E. 280.

(2) 12 Q. B. D. 271.

1890.

*Ex parte*  
**BAIRD.**Allen, C. J.

recount or final addition of the said votes and certificate of the result thereof should be stayed.

It appeared by the affidavits, that in February, 1887, a writ had issued for the election of a member to represent the electoral district of Queens County in the House of Commons of Canada; that the writ was directed to John R. Dunn, as returning officer; that the 15th of February was the day appointed for the nomination of candidates, and the 22nd for the polling day; that Mr. George G. King and Mr. George F. Baird were nominated as candidates on the 15th of February; that Mr. King's nomination was signed by upwards of twenty-five duly qualified electors of the district, and was also assented to and signed by him, and verified by the oath of Mr. T. Medley Wetmore, who also at that time paid to the returning officer the deposit of \$200 required by law, and that he then gave Mr. Wetmore a certificate stating that he had received from him a nomination paper of Mr. King, signed by upwards of twenty-five persons, and signed by Mr. King as consenting thereto, as proved by the affidavit of Mr. Wetmore, and that he had also received a deposit of \$200, as by law required.

A poll having been demanded, an election was held on the 22nd of February, Mr. King and Mr. Baird being the candidates.

On the 5th March, the day fixed for declaring the result of the polling, the returning officer stated the number of votes given for each candidate at the several polling districts; but before announcing the result, Mr. Baird's agent objected that Mr. King had not been legally nominated, the deposit of \$200 not having been made by his duly appointed agent; that all the votes given for him were therefore null and void, and should be rejected, and that Mr. Baird, being the only candidate legally nominated, should be declared duly elected. The returning officer adopted this view and declared Mr. Baird duly elected, though it was admitted that Mr. King had the majority of the votes polled.

On the 7th March, an application on behalf of Mr. King was made to Judge Steadman, on an affidavit stating substantially the above facts, and also stating the belief of the deponent



that one of the deputy returning officers had improperly counted the ballots by keeping them concealed from the agents of the candidates, and that another deputy returning officer had improperly rejected one or more ballots in counting them.

1890.

*Ex parte*  
BAIRD.

Allen, C. J.

On this affidavit an order was made by Judge Steadman appointing the 11th March, at the court house, in Queens County, as the time and place for making a final addition of the votes given at the election, and for re-counting the votes. It was to stay the proceedings under this order that the order nisi for a prohibition was granted by Mr. Justice Tuck.

The grounds on which the order *nisi* was granted were:—

1. That Judge Steadman had no jurisdiction to make the order which he did.
2. That if he had any jurisdiction in the matter, he was attempting to act in excess of his jurisdiction in proposing to recount the votes.
3. That there was but one candidate legally nominated, and whether the returning officer acted rightly or wrongly in rejecting Mr. King's votes, an appeal from his decision could only be made to the Election Court.

In order to fully understand the question in dispute, I think it will be proper to refer to those parts of the "Dominion Elections Act, 1874" (37 Vic. cap. 9), as amended by 41 Vic. cap. 6, which relate to the nomination of candidates, the duties of the returning officers, and the powers of a Judge of the County Court.

After providing in sections 12, 15, 16, 17, for the proclamation by the returning officer (*inter alia*), of the time and place for the nomination of candidates, section 18 declares as follows—"Any twenty-five electors may nominate a candidate, or as many candidates as may be required to be elected for the electoral district for which the election is held, by producing to the returning officer, at the time and place indicated in this proclamation, a writing in the form of Schedule F, under their hands, giving the name, residence, and addition or description of each person proposed in such manner, as sufficiently to identify such candidate. Each candidate shall be nominated by a separate nomination paper."

1890.

*Ex parte*  
**BAIRD.**Allen, C. J.

"At the close of the time for nominating the candidates, the returning officer shall deliver to every candidate or agent of a candidate applying for the same, a duly certified list of the names of the several candidates who shall have been nominated. And any votes given at the election for any other candidates than those so nominated shall be null and void."

Sec. 19. — "No nomination paper shall be valid and acted on by the returning officer, unless it be accompanied by the consent in writing of the person therein nominated, except in case such person is absent from the Province in which the election is to be held, when such absence shall be stated in the nomination paper; nor unless a sum of two hundred dollars be paid to the returning officer at the time the nomination paper shall be filed with him; and the receipt of the returning officer shall in every case be sufficient evidence of the production of the nomination paper, consent of candidate and of the payment herein mentioned."

Sec. 21 directs that the returning officer shall require the person producing such nomination paper to make oath before him that he knows the several persons who have signed such nomination paper to be electors duly entitled to vote, and that they had signed the same in his presence; and that the consent of the candidate had been signed in his presence, or that the person named as candidate was absent from the Province, as the case might be.

Sec. 22 directs that, whenever only one candidate, or only such a number of candidates as are required by law to be elected to represent the electoral district for which the election is held, have been nominated within the time fixed for that purpose, the returning officer shall make his return to the clerk of the Crown in Chancery, that such candidate or candidates, as the case may be, is or are duly elected for the said electoral district.

Sec. 23. — The returning officer shall accompany his return to the clerk of the Crown in Chancery with a report of his proceedings, and of any nomination proposed and rejected for non-compliance with the requirements of this Act.

Sec. 24 directs that if more candidates than the number

required to be elected are nominated in the manner required by the Act, it shall be the duty of the returning officer to grant a poll for taking the votes of the electors, and to cause to be posted up notices of his having granted such poll, indicating the names, residences and occupations of the candidates so nominated, in the order in which they shall be printed on the ballot papers.

1890.

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*Ex parte*  
BAIRD.

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Allen, C. J.  

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The Act then provides for the appointment of deputy returning officers for the different polling stations; the manner of taking the votes; the counting of the ballots at each polling station, and the return of the ballot boxes and ballots to the returning officer; and declares in sec. 59, that the returning officer, at the place, day and hour appointed by his proclamation, and after having received all the ballot boxes, shall proceed to open them in the presence of the election clerk, the candidates or their representatives, if present, and of at least two electors, if the candidates or their representatives are not present, and to add together the number of votes given for each candidate, from the statements contained in the several ballot boxes returned by the deputy returning officers. The candidate who shall, on the summing up of the votes, be found to have a majority of the votes, shall be then declared elected."

Sec. 61 declares that the returning officer, within four days after such verification (i. e. after the summing up the votes given for each candidate, and declaring who is elected), shall transmit his return to the clerk of the Crown in Chancery that the candidate having the largest number of votes has been duly elected, and shall forward to each of the respective candidates a duplicate or copy thereof; and such return shall be in the form schedule S to the Act.

These are the only sections of this Act which treat of the nomination papers and of the duties of the returning officer, in adding up the votes.

I can see no objection whatever to the nomination paper presented for Mr. King. All the provisions of the statute respecting nomination papers were complied with. It was signed by upwards of twenty-five electors; it contained the written consent of Mr. King to his nomination; the deposit of \$200 was paid to the returning officer at the time; Mr.

1890.

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*Ex parte*  
**BAIRD.**

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Allen, C. J.

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Wetmore who produced the nomination paper to the returning officer, made oath to the facts required to be sworn to by the 21st section; and the returning officer received the paper and deposit, and gave Mr. Wetmore a certificate to that effect, and granted a poll for taking the votes of the electors for the two candidates.

If the nomination was insufficient the returning officer no doubt might have rejected it, but he did not do so. On the contrary, he received it and adjudged it sufficient, and every act which he did at that time shewed that he had so decided. I think, even assuming his decision to have been wrong (which, however, I do not), his power of adjudicating upon the sufficiency of the nomination paper was at an end when he accepted it and granted a poll; and he had no right afterwards at the time for adding up of the votes, to decide that Mr. King's nomination was illegal, and that the votes polled for him were null and void, and therefore that Mr. Baird was the only candidate legally nominated.

The case of *Reg. v. Mayor of Bangor* (1) is very applicable to this part of the present case. There two candidates were nominated for the office of councillor in one of the wards of the borough of Bangor. Roberts, one of the candidates, was at the time of the nomination, and up to and including the time of the election, an alderman for the borough, and the other candidate, Pritchard, objected to his nomination on the ground that he was ineligible for election because he held the office of alderman. The objection was over-ruled and the election proceeded. After the polling was completed the ballots were counted by the returning officer. Both before the commencement of the counting and during its progress Pritchard objected that Roberts was disqualified from being elected on the ground of his holding the office of alderman, and claimed that he (Pritchard) was elected, whatever the result of the poll might be. When the votes had been counted, it was found that Roberts had the majority, but the returning officer, having taken legal advice, came to the conclusion that Roberts was disqualified from being elected by reason of his being an alderman of the borough, and declared that Pritchard was

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(1) 18 Q. B. D. 349.

duly elected as councillor. He afterwards made and subscribed the declaration required by the Municipal Corporations Act, and attended a meeting of the council, but the mayor refused to receive and count his vote. Roberts also made and subscribed the declaration, and voted at the meeting.

1890.

*Ex parte*  
BAIRD.

Allen, C. J.

Pritchard obtained a rule nisi for a mandamus to the mayor and corporation of the borough, commanding them to receive and count his vote at the corporate meeting of the council. That rule was made absolute, but on appeal that judgment was reversed.

The section of the Ballot Act (35 & 36 Vic., cap. 33) on which this branch of the case turned, provided that in case of a poll at an election, the votes should be given by ballot, and declared that "after the close of the poll the ballot boxes should be sealed up, etc., and taken charge of by the returning officer, who shall in the presence of the candidates or their agents, open the ballot boxes and ascertain the result of the poll by counting the votes given to each candidate, and shall forthwith declare to be elected the candidates or candidate to whom the majority of the votes have been given."

Lord Esher, M. R., in delivering judgment on the appeal, said on this point: "We have to say what are the powers and duties of a returning officer in a municipal election. First comes the nomination which is to take place before the mayor. It is not necessary here to decide whether the mayor could reject the nomination of a candidate not properly qualified. If he had that power, he did not exercise it in the present case, because he accepted the nomination of both candidates. Then come the powers and duties of the returning officer, which are indicated in and limited by the 2nd section of the Ballot Act, 1872. Those powers and duties begin after the close of the poll. He is to take charge of the ballot boxes; open them in the presence of the agents (if any) of the candidates, and ascertain the result of the poll by counting the votes given to each candidate. The result of the poll is what he is to ascertain, and he must ascertain it in the way prescribed by the Act, and in that way only. The section then proceeds: 'and shall forthwith declare to be elected the candidate or candidates to whom the majority of votes have

1890.

*Ex parte*  
BAIRD.

Allen, C. J.

been given.' No power is given to him to declare that candidate elected to whom the majority of the votes has been *legally* given. The moment he has cast up the vote he must declare the candidate elected who has the arithmetical majority. The section does not entitle him to inquire whether the candidate is under any personal disability to be elected. \* \* \* \*. The returning officer has simply to perform the arithmetical duty of adding up the votes, and to declare the person elected who has the majority. Though it is not necessary to decide the point, I am inclined to think that his declaration is merely ministerial, and that, if he remained silent and did not make any declaration, the person who had the majority of votes would be duly elected."

Lindley, L. J., said: "Looking at the terms of sec. 2 of the Ballot Act, 1872, it is, I think, clear that the returning officer has no power to declare a person elected who has not obtained a majority of votes. It is the majority of votes which determines the election, and the returning officer is to declare that person to be elected to whom the majority of votes has been given."

Lopes, L. J., speaking on the same point said: "He (the returning officer) has no power to inquire to whom the majority of *legal* votes has been given. I think that directly he has ascertained by counting, to whom the majority of votes has been given, his simple duty is clearly and indisputably to declare that person elected. It cannot be that he has any power to declare with respect to the eligibility or ineligibility of any candidate."

The judgment in that case is very applicable to the present one; the duties of the returning officer, after counting the ballots under the English Ballot Act, being almost identical with those prescribed by the 59th section of the Act under which the election was held in this case.

I will now consider the grounds on which the decision of the returning officer was arrived at in this case.

It is admitted that it was because Mr. Wetmore, who presented Mr. King's nomination paper and paid the deposit, had not been appointed Mr. King's agent, and that no written authority so appointing him had been delivered to the returning

officer. In my opinion no such authority was necessary to perfect the nomination, as I can find nothing in the Act requiring it. The eighteenth, nineteenth and twenty-first sections, which deal with the mode of nominating a candidate, say nothing about the nomination paper being presented by an agent of the candidate appointed in writing. The only direction as to the invalidity of a nomination paper is contained in the nineteenth section, which declares that no nomination paper shall be valid and acted on by the returning officer unless it be accompanied by the consent in writing of the person nominated, nor unless the deposit of \$200 is paid at the time. Both these requisites were complied with in the present case.

Of what possible consequence can it be by whom the nomination paper is presented to the returning officer and the deposit paid, provided the requisite number of electors have signed it, the person nominated has given his written assent to it, and the deposit is paid? These are the essentials in a nomination, and any mistakes in mere matter of form would not invalidate an election where the nomination paper had been received by the returning officer. See section 80. I do not admit that there is any such mistake in this case.

The only section of the Act referring to the written appointment of agents is the 36th, which declares that "any person producing to the returning officer or deputy returning officer, at any time, a written authority from a candidate to represent him at the election, or at any proceeding of the election, shall be deemed an agent of such candidate within the meaning of this Act."

This section, obviously, has nothing to do with the presentation of a nomination paper. It relates to the right of the agent of a candidate to be present in the room where the votes are given, under certain conditions; to see that the ballot boxes are empty before the voting begins; to require electors to take the oath of qualification; to be present at the close of the poll when the ballots are counted by the deputy returning officers; and, probably, to the liability of the candidate if certain illegal acts are done by his agent during the election.

One ground on which it was contended that the returning officer was justified in rejecting the votes given for Mr. King,

1890.

*Ex parte*  
**BAIRD.**Allen, C. J.

1890.

*Ex parte*  
BAIRD.

[Allen, C. J.]

was the concluding words of the 18th section, which declares that "any votes given at the election for any other candidates than those so nominated shall be null and void." But what is the meaning of the words "so nominated?" Strictly, they mean nominated in the manner prescribed in the preceding part of the 18th section; that is, by twenty-five electors in the form directed in the schedule. But I think they should be read in connection with the nineteenth section, which declares that no nomination paper shall be acted on by the returning officer unless the person nominated assents to it in writing, and the deposit is made. In the present case Mr. King was nominated in every respect in accordance with what the Act required, and the returning officer treated him as a candidate throughout the election. So that there was no justification under these words in section 18 for declaring that he was not a candidate, and that the votes given for him were null and void.

I will now consider the question whether Judge Steadman had authority to make the order which he did.

Sec. 64 of the Dominion Elections Act (Rev. Stat. Can. c. 8) declares that if within four days after that on which the returning officer has made the final addition of the votes for the purpose of declaring the candidate or candidates elected, it is made to appear on the affidavit of any credible witness, to the Judge of the County Court of the electoral district, that such witness believes that any deputy returning officer at the election in counting the votes has improperly counted or has improperly rejected any ballot paper, or that the returning officer has improperly summed up the votes, the said Judge shall appoint a time within four days after the receipt of such affidavit, to recount the votes or to make the final addition, as the case may be; and shall give notice in writing to the candidates or their agents, of the time and place at which he will proceed to recount the votes, or make such final addition.

A doubt has been raised whether it sufficiently appeared by the affidavit laid before Judge Steadman, that the returning officer ever did make a final addition of the votes; and whether, in the absence of such a statement, Judge Steadman had any jurisdiction to make an order. I think it does sufficiently



appear by the affidavit, though it is not expressly so stated, that the returning officer did make a final addition of the votes. At all events, it was not disputed that Mr. King had the majority, which could not very well appear unless the returning officer had done something to satisfy himself of that fact. If Mr. King had not the majority of the votes, and that had not been apparent to the returning officer and the candidates, or their agents at the time, why should Mr. Baird's agent have applied to the returning officer to reject all the votes given for Mr. King, and to declare Mr. Baird to be elected; and why should the returning officer have acted on that application in opposition to the contention of Mr. King's attorney that he had the majority of the votes, and was therefore entitled to be declared elected?

1890.

*Ex parte*  
**BAIRD.**

Allon, C. J.

Had the affidavit which was laid before Judge Steadman merely stated that the deputy returning officers had improperly counted or rejected ballots, I would probably have thought sufficient was shown to give the Judge jurisdiction to issue the order which he did, as the Act only requires the person making the affidavit to state his belief as to the improper counting or rejecting of ballots. But the affidavit goes much further than that, and shows that the real object of the proposed recount was not to rectify an improper counting or addition of the votes given, whereby a wrongful result was arrived at by the returning officer; but was in effect to reverse his decision that all the votes given for Mr. King were null and void because he was not legally nominated; and to enable the Judge of the County Court to certify to the returning officer that Mr. King had the highest number of votes, in order that the returning officer should be obliged to declare Mr. King to be elected. This, I think, the Judge had no power to do. His power in the matter only extends to rectifying mistakes in counting the votes, arising either from the improper admission or rejection of ballots, or the wrong adding up of the number of votes, whereby a candidate who had not really received a majority of the votes given, had been declared elected.

However illegal the act of the returning officer was in deciding that Mr. King was not legally nominated, and therefore that the votes given for him could not be counted, that was not

1890.

Ex parte  
BAIRD.Allen, C. J.

a matter which the Judge of the County Court had power by the Act to rectify.

The remaining question is, whether a writ of prohibition will lie to prohibit Judge Steadman from proceeding with his proposed recount of the votes. I think it will. Though in a mere recount of the votes the duties of the County Court Judge may be only ministerial, yet, in cases where he has to determine whether ballots have been improperly received or rejected by the returning officer, his duties would be judicial. In the latter case, a prohibition would lie if he exceeded his jurisdiction.

In 3 Bla. Com. (21st ed.) 112, it is said that a prohibition is a writ directed to the Judge and parties to a suit in any inferior Court, commanding them to cease from the prosecution thereof, upon a suggestion that either the cause originally, or some collateral matter arising therein, does not belong to that jurisdiction, but to the cognizance of some other Court.

In *Warner v. Suckerman* (1) Lord Coke said: "We, in this Court (The King's Bench) may prohibit any Court whatsoever, if they transgress and exceed their jurisdiction." And Cockburn, C. J., in *Martin v. Mackonochie* (2) used language equally absolute, but his judgment was dissented from on appeal, so far as it applied to the Judicial Committee of the Privy Council.

In *Shortt on Informations*, 436, it is said: "The broad governing principle is that a prohibition lies where a subordinate tribunal has no jurisdiction at all to deal with the cause or matter before it, or where in the progress of a cause within its jurisdiction some point arises for decision which the inferior Court is incompetent to determine. But a prohibition will not lie where the inferior Court has jurisdiction to deal with the cause and with all matters necessarily arising therein, however erroneous its decision may be upon any point."

In *Worthington v. Jeffries* (3) it was held that where a superior Court is clearly of opinion, both with reference to the facts and the law, that an inferior Court is exceeding its jurisdiction, it is bound to grant a writ of prohibition.

The right of a Judge of this Court sitting in Chambers to

(1) 3 Bulst. 120.

(2) 3 Q. B. D. 730; 4 Q. B. D. 679.

(3) L. R. 10 C. P. 379.

grant an order *nisi* for a prohibition has been already decided in *Ex parte Baird, In re Steadman* (1).

1890.

*Ex parte*  
*BAIRD.*

Allen, C. J.

I therefore think that the rule should be made absolute in this case for a prohibition, but without costs, as the whole difficulty arose out of the illegal act of the returning officer, in refusing to return the candidate who had the majority of votes as the statute plainly directed him to do.

In addition to this the decision is of no importance now to the parties concerned, another election having since taken place in the County.

KING, J. The returning officer having rejected the votes given for Mr. King on the ground that he had not been legally nominated, and that the votes therefore were null and void under Revised Statutes of Canada, cap. 8, sec. 21, the question as to the legality of the nomination may very well be first considered. The alleged defect consisted in the fact that the sum of \$200 which was deposited with the returning officer at the time of the filing of the nomination paper was not deposited either by the candidate personally or by an agent whose name or address had been declared in writing to the returning officer, on or before nomination day.

Sec. 22 of The Elections Act (Rev. Stat. Can. cap. 8) declares that no nomination paper shall be valid and acted upon by the returning officer unless it is accompanied by the consent in writing of the person therein nominated, except when such person is absent from the Province in which the election is to be held, in which case such absence shall be stated in the nomination paper; and unless a sum of \$200 is deposited in the hands of the returning officer at the time the nomination paper is filed with him: and the receipt of the returning officer shall, in every case, be sufficient evidence of the production of the nomination paper, of the consent of the candidate, and the payment herein mentioned. The sum so deposited by any candidate shall be returned to him in the event of his being elected, or of his obtaining a number of votes at least equal to one half the number of votes polled in favor of the candidate elected, otherwise it shall belong to Her Majesty for the public

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(1) See next case.

1890.

*Ex parte*  
BAIRD.King, J.

uses of Canada; and the sums so paid and not returned, as herein provided, shall be applied by the returning officer towards the payment of the election expenses.

The term "election expenses," as here used, obviously means the expenses incurred by the returning officer on behalf of the public in conducting the election. It has no reference to the election expenses of the candidate. These latter are dealt with in sections 118, 120, under the caption "Election Expenses."

Sec. 118 enacts that "no payment (except in respect of the personal expenses of a candidate), and no advance, loan or deposit shall be made by or on behalf of any candidate at any election, before or during or after such election, on account of such election, otherwise than through an agent or agents whose name or names, address or addresses, have been declared in writing to the returning officer on or before nomination day, or through an agent or agents to be appointed in his or their place, as herein provided; and any person who makes any such payment, advance, loan or deposit, otherwise than through such agent or agents, is guilty of a misdemeanor." The caption "Election Expenses," under which secs. 118, 119 and 120 are found, is part of the Act, and is to be looked at in the interpretation of the sections to which it relates. The advance, loan or deposit on account of the election, is therefore to be taken as referring to the election expenses, and these, as shown by secs. 119 and 120, are the election expenses incurred by or on behalf of the candidate. Now the compulsory deposit of \$200 cannot be deemed an election expense incurred by the candidate. It may be, and ordinarily is, returned to the candidate. In the case before us it certainly was so returnable. In my view, secs. 118, 119 and 120 relate wholly to voluntary expenses, and the object of the provisions is, by securing publicity, to put a check upon improper expenditures.

Further, the Act admits of a person being nominated in his absence from the Province, and under circumstances which do not admit of his giving his consent in writing to his nomination. Such nomination would not be practicable or possible if a deposit by himself, or by an agent authorized by him in writing is requisite to a valid nomination.

I think that the deposit was well made by the person who produced the nomination paper to the returning officer, and that section 118 is inapplicable. I therefore am of the opinion that the returning officer was wrong in determining that Mr. King was not legally nominated.

1890.

*Ex parte*  
BAIRD.King, J.  

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II. But although his decision was wrong, it may still have been within his competency to decide upon the question of the legality of the nomination after the polling, subject, if wrongly decided, to be reversed upon appeal to the proper authority. This raises a question as to the powers and authority of the returning officer after a poll has been granted.

Sec. 60 of the Election Act provides that:—

“The returning officer at the place, day and hour appointed by his proclamation, and after having received all the ballot boxes, shall proceed to open them in the presence of the election clerk, the candidates or their representatives if present, or at least two electors, if the candidates or their representatives are not present, and to add together the number of votes given for each candidate from the statements contained in the several ballot boxes returned by the deputy returning officers of the ballot papers counted by them. The candidate who, on the summing up of the votes, is found to have a majority of votes, shall be then declared elected.”

It was contended by Mr. Gregory that the returning officer's power was limited to the adding up of the figures shewn by the statements of the deputy returning officers, and to the declaring of the result. *The Queen v. Mayor of Bangor* (1), was relied on. That was a case of a Municipal Election under the Municipal Corporations Act, which declared that elections should be held according to the provisions of the Ballot Act governing parliamentary elections. By the Ballot Act it was enacted that after the polling “the returning officer shall, in the presence of the agents (if any) of the candidates, open the ballot boxes and ascertain the result of the poll by counting the votes given to each candidate, and shall forthwith declare to be elected the candidates or candidate to whom the majority of the votes has been given, and return their names to the clerk

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(1) 18 Q. B. D. 340.

1890.

*Ex parte*  
BAIRD.King, J.

of the Crown in Chancery." This provision, it will be observed, is very similar to sec. 60 of our Elections Act.

On the day set for opening the ballot boxes, it was objected that one of the candidates was disqualified. The objection was over-ruled and the number of votes received by each candidate was announced. Subsequently the returning officer came to the conclusion that the disqualification existed, and published a notice declaring the others elected. It was held by the Court of Appeal that the returning officer had no power to decide upon matters of qualification, but that his duty was confined to the summing up of the votes and the declaring of the result shewn thereby.

The Master of the Rolls says:—

"We have to say what are the powers and duties of a returning officer in a municipal election. First comes the nomination which is to take place before the Mayor. It is not necessary here to decide whether the Mayor could reject the nomination of a candidate not properly qualified. If he had that power, he did not exercise it in the present case, because he accepted the nomination of both candidates. Then come the powers and duties of the returning officer, which are indicated in and limited by the second section of the Ballot Act. Those powers and duties begin after the close of the poll. He is to take charge of the ballot boxes; open them in the presence, etc., and ascertain the result of the poll by counting the votes given to each candidate. The result of the poll is what he is to ascertain, and he must ascertain it in the way prescribed by the Act, and in that way only. The section then proceeds—'And shall forthwith declare to be elected the candidate or candidates to whom the majority of votes have been given.' No power is given to him to declare that candidate elected to whom the majority of votes has been legally given. The moment he has cast up the votes he must declare the candidate elected who has the arithmetical majority. The section does not entitle him to inquire whether the candidate is under any personal disability to be elected, whether the candidate be man or woman, or whether the person named be dead or alive. The returning officer has simply to perform the arithmetical duty of adding up the votes, and to declare the person elected who has the ma-

majority. Though it is not necessary to decide the point, I am inclined to think that his declaration is merely ministerial, and that if he had remained silent, and did not make any declaration, the person who had the majority of votes would be duly elected. \* \* \* He has no return to make to anybody, as in the case of a parliamentary election, where a return must be made to the clerk of the crown. A municipal election is over the moment the voting papers have been counted and the returning officer has stated the result."

It is obvious that this decision is intended to be limited to the case of a returning officer in municipal elections. The case of a returning officer in parliamentary elections is sharply distinguished.

It cannot be said of the returning officer under the Dominion Elections Act, as was said of the returning officer under the Municipal Corporations Act, that "he is not entitled to inquire whether the candidate is under any personal disability to be elected." Thus by cap. 13, Rev. Stat. Can., sec. 1, members of provincial legislatures are rendered ineligible as members of the House of Commons and incapable of being nominated or voted for at any election. And sec. 2 declares that "if any member of a provincial legislature, notwithstanding his disqualification as in the preceding section hereof mentioned, receives a majority of votes at any such election, such majority of votes shall be thrown away, and the returning officer shall return the person having the next greatest number of votes, provided he is otherwise eligible." This was originally the 35 Vic., cap. 15, sec. 2, and sec. 60 of the Elections Act (originally 37 Vic., cap. 9, sec. 59) is to be read as subject to it.

So where a candidate withdraws after nomination, and before the closing of the poll under section 27, "Any votes cast for the candidate who has so withdrawn shall be null and void." And in case there are more candidates remaining than the number to be elected, the votes for the candidates so withdrawing are to be rejected at the time of the final adding up. If by any chance the candidate so withdrawing was found to have the greatest number of votes, it could scarcely be argued that the returning officer would be bound to declare him elected under sec. 60.

1890.

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*Ex parte*  
BAIRD.

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King, J.  

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1890.

*Ex parte*  
**BAIRD.**King, J.

These provisions of the law show that the duties and powers of the returning officer, under our Elections Act, are not confined to what Lord Esher styles "the arithmetical duty of adding up the votes and declaring the person elected who has the greatest number of votes." The last clause of cap. 13, sec. 2 appears to show that the returning officer is to decide in the first instance all questions of eligibility. Then, how is it where a candidate has not been legally nominated? Sec. 21 (3) says that "any votes given at the election for any other candidate than those so nominated, shall be null and void." It has been contended that the words "so nominated" mean so certified by the returning officer as having been nominated in the certified list which he is to deliver to the candidate if requested.

But it does not say so, and there is a substantial difference between the two things. Then, the words "so nominated" grammatically relate to what is denoted by the word "nominated" in the clause immediately preceding; and there the word means all that is necessary to make a valid nomination upon which the returning officer may act, and by sec. 22 this includes the making the deposit. Further, if the meaning contended for is correct, the votes are declared null and void only in case a candidate or his agent applies for a certified list. Besides, it appears unreasonable to determine the right of the parties not by the fact, but by the ministerial act of certifying as to the fact. To this might be added the difficulty of construing and applying the clause in case one of several certificates differs from the others.

Then it is suggested that the words "so nominated" have sole reference to the preceding provisions relating to the number of electors who shall nominate, the filing of the nomination papers, etc. But the Act has to be read as a whole, and the section which follows shows that a person is not to be deemed as nominated unless (amongst other things) the deposit is made. Unless these conditions are performed there is not a valid nomination, and the returning officer is not to act upon the nomination paper. Therefore everything that is involved in making such a nomination as shall be valid and as may be acted upon by the returning officer is necessary to exist, other-



wise all votes given for any person not so nominated are null and void.

1890.

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*Ex parte*  
BAIRD.

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King, J.  

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It is then contended by Mr. *Gregory* that if the returning officer has power to decide upon the validity of a nomination, he can do so only at the time that it is made, and that as, in this case, the returning officer accepted the nomination he was thereafter *functus officio* as to this, and that its validity could thereafter be contested only upon election petition. But I think that the sounder view is that wherever it is declared by statute that all votes given for a candidate are to be null and void, it is within the competency of the returning officer so to treat them when he comes to determine the result of the election. The Statute, cap. 13, sec. 2, says in terms that he is to do this where the candidate is a member of a Provincial Legislature. He has also to do this in the case of the withdrawal of a candidate under the circumstances already alluded to. Then as to his already having passed upon the matter in accepting the nomination, that might or might not be with knowledge of the objection or of the facts. In cases under cap. 13, sec. 2, the fact of previously having accepted the nomination would not affect the right of the returning officer to reject the votes after the polling and the summing up. Then as to cases where there has been no nomination, the Act says that votes given for a person not nominated (i. e. not legally nominated) shall be null and void; and this can apply only to the case of persons who have been accepted as candidates by the returning officer, inasmuch as all votes are to be given through ballot papers furnished by the returning officer to the deputy returning officer, and by him supplied to the voter; and as a matter of course, these contain no name which has not been accepted by the returning officer. The provision is not directed against the use of improper ballot papers, because this is dealt with by sec. 56, which provides for the rejection of all ballot papers which have not been supplied by the deputy returning officer, and such ballots are rejected irrespective of whether the person voted for has been properly nominated or not. Then, as votes given for a person not legally nominated are declared to be null and void, is it reasonable to suppose that parliament, having so declared them to be null and void, intended at the same

1890.

Ex parte  
BATRD.King, J.

time that the returning officer should treat them as good and valid, and make a return in the face of the statute which would certainly be set aside on petition? The principles which guide the Election Court on petition are the same as those on which the several authorities below should act in the discharge of their respective duties. It must be assumed that the statute contemplates a good return being made in the first instance, i. e., a return in accordance with the principles of the statute. But if the returning officer is powerless to reject, as null and void, votes given for a candidate not legally nominated, how is it possible in the cases covered by this provision of the statute to secure a return in accordance with the principles of the statute? If the returning officer cannot give effect to the statutory provision, no one can, short of an election petition. I am therefore of the opinion that Mr. *Currey* has properly construed the Act, and that the votes which the returning officer is to sum up under sec. 60, are votes for candidates who have some valid votes; and that when all the votes given for a candidate are declared by the Act to be null and void, such votes are to be treated as null and void by the returning officer, whenever he is called upon to deal with them.

The returning officer then having authority to reject such votes, he has jurisdiction to decide whether the circumstances exist which make the votes null and void. In such a matter he is not a mere ministerial officer entrusted with the reporting of an actual majority, as in *Reg. v. Ledgard*; (1); but, as to this duty, is a judicial officer entrusted with the determination of an important question: *Reg. v. Owens* (2); *Cullen v. Morris* (3); In the case before us, his decision was in my opinion wrong; but, right or wrong, he was the tribunal to determine the matter in the first instance.

III. The next question is whether the Judge of the County Court has jurisdiction to correct the error. The jurisdiction of the County Court Judge is given by section 64 of the Elections Act. This provides that if within four days after that on which the returning officer has made the final addition of the votes for the purpose of declaring the candidate elected, it is made to appear, on the affidavit of any credible witness,

(1) 8 A. &amp; E. 536.

(2) 2 E. &amp; E. 86.

(3) 2 Stark. 577.

to the Judge of the County Court, that such witness believes that any deputy returning officer in counting the votes (1) has improperly counted, or (2) has improperly rejected any ballot papers at such election, or (3) that any one voted whose name was not, etc., etc. (the particulars of this are not necessary to be specified), or (4) that the returning officer has improperly summed up the votes, then, upon security for costs being given, the said Judge shall appoint a time and place to recount or make the final addition (as the case may be), and shall give notice, etc., and summon the returning officer to attend with ballot papers, etc. He shall then proceed to make such final addition or recount of the votes, as the case may be, and shall certify the result to the returning officer, who shall then declare to be elected the candidate having the highest number of votes. In case of recounting the votes the County Court Judge is to proceed according to the rules set forth in sec. 56. By this section the only ballots to be rejected are "all ballot papers which have not been supplied by the deputy returning officer; all those by which votes have been given for more candidates than are to be elected; and all those upon which there is any writing or mark, by which the vote could be identified, other than the numbering by the deputy returning officer in the case hereinbefore provided for."

There is therefore no power in the County Court Judge to decide whether votes given for a candidate are null and void on the ground that he is not eligible, or was not properly nominated. He is simply to review and decide upon the work of the deputy returning officers in counting, and the work of the returning officer in the summing up, and then is to certify the result to the returning officer.

The candidate might be a member of a Provincial Legislature, or might have withdrawn, or might not have been properly nominated; but with this the County Court Judge has nothing to do.

Then it is a condition of the County Court Judge's jurisdiction that there should have been a final addition by the returning officer for the purpose of declaring the candidate elected, inasmuch as the application to the County Court Judge is to be made within four days after such summing up. The final

1890.

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*Ex parte*  
BAIRD.

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King, J.  

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1890.

*Ex parte*  
BAIRD.

King, J.

addition must have been made for the purpose of declaring the candidate elected. What is the force of these words? It is important to look at all the provisions on the subject. After the returning officer has summed up, "the candidate who, on the summing up of the votes, is found to have a majority of votes shall be then declared elected." Sec. 60, (2). The returning officer shall then delay his return to the clerk of the crown in chancery for six days. But if, in the meantime, he receives notice to attend before the County Court Judge, he shall delay making his return until he receives from the Judge a certificate of the result of the recount and final addition by him. Upon receiving such certificate, the returning officer shall then declare to be elected the candidate found by the County Court Judge to have the highest number of votes, and shall forthwith make and transmit his return accordingly. Secs. 64 (7), (8), 65.

I am of opinion, upon the construction of these sections, that the County Court Judge has jurisdiction only where there has been a summing up by the returning officer resulting in a declaration under sec. 60 (2), based upon, and made in accordance with, and in pursuance of, the result of the summing up or final addition so made by him. It is then only (in my opinion) that he can be said, under sec. 64, to have "made the final addition of votes for the purpose of declaring the candidate or candidates elected." The acts of the returning officer are to be looked at as a whole. If the declaration which he is to make forthwith after summing up [sec. 60 (2)] is in fact based upon the summing up, and determined by it, then such summing up or final addition is made for such purpose; but if his declaration is not in fact based upon the result of such summing up, then the addition (such as it is) is a mere abortive proceeding and surplusage, and is not to be deemed as being made for the purpose of declaring the result of the election. This appears to me the sensible and common sense construction of the clauses. Test it in this way. Take once more a case arising under Rev. Stat. Can., cap. 13, secs. 1 and 2; and suppose that upon the day set by the returning officer for the summing up and declaring the result, the returning officer proceeds to add together the votes given for the two candidates, and completes

such addition ; but before the formal declaration of the result, an objection is taken to the qualification of one of the candidates upon ground that he was a member of a Provincial Legislature on the day of nomination, and the returning officer, after hearing the parties, sustains the objection. What is then to be done ? The statute says that, notwithstanding that such candidate has received a majority of the votes (a fact which assumes that there has been a summing up or final addition by the returning officer, with the result that such candidate is shown to have the majority of votes), such majority of votes shall be thrown away, and the returning officer shall return the person having the next greatest number of votes, provided that he is otherwise eligible, *i. e.*, provided the returning officer decides that he is otherwise eligible.

1890.

*Ex parte*  
BAIRD.King, J.

Now would any one say, in such a case, that because the arithmetical process of adding up was gone through with, the County Court Judge could be called upon to proceed to a recount and final addition of the votes, and so by a side-wind get rid of the decision of the returning officer upon the point of disqualification ? It might well be that the returning officer's decision on that matter might be erroneous, or even absurd, or even wickedly wrong ; but it can not be set right under the form of a recount and final addition. To attempt this would be to contravene the manifest requirements of cap. 13, sec. 2. It follows that, in determining whether there has been a "final addition of the votes for the purpose of declaring the candidates elected" within the meaning of sec. 64 of the Elections Act relating to the jurisdiction of the County Court Judge, we are to regard the acts of the returning officer taken as a whole, and not to rest in any half-formed purposes or latent intentions. The matter is to be regarded practically. The statute gives to the County Court Judge the right of review, for the purpose of correcting erroneous counting or erroneous summing up which had a practical result in affecting (by reason of the error in counting or the error in summing up) the declaration of the candidate elected. To put it in another form : the object of the County Court review is to alter a result erroneously reached through certain errors, viz, errors in the count or errors in the summing up. Where

1890.

*Ex parte*  
**BAIRD,**King, J.

the result is reached through the exercise by the returning officer of another jurisdiction possessed by him, as for instance the jurisdiction to decide upon questions of eligibility or of validity of nomination (supposing he has such jurisdiction), then there is no right of review by the County Court Judge.

IV. Next as to the facts appearing in the case as showing what was done by the returning officer. The application to Judge Steadman was made upon the affidavit of T. Medley Wetmore, and was both for a recount (alleging improper counting and improper rejection of votes by deputy returning officers) and for a final addition by the County Court Judge. As to what was done by the returning officer, Mr. Wetmore says, that on 5th March (the day to which the returning officer's court was adjourned), "the said returning officer, in the presence of the election clerk, the candidates and a large number of electors, proceeded to open the ballot boxes and to add together the number of votes given for each candidate from the statements contained in the several ballot boxes returned by the deputy returning officers, and then and there announced that in polling district No. 1 Baird had received thirty-five votes and King thirty-seven votes"; and then the affidavit goes through the fourteen polling districts, giving the vote in each district for each candidate, but not giving the totals, or stating that the figures so given from the statements of the deputy returning officers were summed up by the returning officer; but after stating that the returning officer so announced the number of votes in the several polling districts, the affidavit continues as follows: "whereupon Mr. L. A. Currey, acting for Mr. Baird, asked the returning officer to reject all the votes given for Mr. King, and to declare Mr. Baird elected upon the ground by him stated, that the nomination of Mr. King was void in consequence of the fact that the \$200, deposited with his nomination papers, was not deposited by his general election agent, or to that effect, when after hearing Mr. Gregory on behalf of Mr. King, and Mr. Currey in reply, the said returning officer decided then and there, that all the votes given for Mr. King at the said election were invalid; and refused to sum them up and count them for Mr. King, and declare him, as having the largest number of votes polled, elected; but rejected the whole

number of votes for Mr. King, and then and there declared Mr. Baird elected."

1890.

*Ex parte*  
BAIRD.

King, J.

It thus appears, according to Mr. Wetmore's narration of the circumstances, that there was in fact no summing up at all, even of the votes of Mr. Baird. There is (following the language of the statute) a general statement that the returning officer proceeded to do so and so; but what he really did is then detailed, and from the detailed account of what took place there was nothing (according to Mr. Wetmore's narration of facts) that resembled in the least a summing up of the votes, and this was (as I understand it) all that was before the County Court Judge. The want of jurisdiction, therefore, appeared upon the face of the application, and in my view the learned County Court Judge should have declined to act.

Mr. Baird, in his affidavit used on obtaining the prohibition, states the facts more favorably for the other side; for (as he puts it) the arithmetical process of adding up the votes for the two candidates was gone through with. According to Mr. Baird's affidavit, the returning officer opened the ballot boxes and added together the number of votes given for each candidate from the statements contained in the several ballot boxes returned by the deputy returning officers, and stated that he found by such statements that 1,191 votes had been given for Mr. King and 1,130 votes for Mr. Baird; that after the addition had been made, and before the returning officer had declared any candidate elected, Mr. Baird's counsel objected to the votes for Mr. King as null and void, on the ground that he had not been legally nominated; and that the returning officer decided that Mr. King had not been legally nominated, and that therefore the votes given to him were null and void, and that Mr. Baird was the only candidate legally nominated; and that the returning officer declared him elected accordingly.

On Mr. King's affidavit used in reply, there is less reason to conclude that there was a summing up.

What is established beyond all reasonable possibility of doubt upon these affidavits is, that the returning officer assumed to have the right at that stage to decide upon an objection taken to the validity of Mr. King's nomination, and that his final act, the declaration by him of the candidate elected, was

1890.

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*Ex parte*  
BAJED.

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King, J.  

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not based upon any addition made by him, but was based upon the effect of his decision upon the objection so taken to Mr. King's nomination. Looking therefore at the substantial facts and at all that took place, it appears to me impossible to say that there was any final addition of the votes for the purpose of declaring the candidate elected, within the meaning of the Act.

There was therefore no jurisdiction in the learned Judge of the County Court, and his proposed recount and final addition (if it had gone on) would have been a nullity, which the returning officer might well disregard, independently of any writ of prohibition.

V. But prohibition having been applied for, and an order *nisi* having issued, the remaining question is whether or not the Court has power to issue the writ in case of an attempted unauthorized interference with the proceedings of a returning officer. In the first place, it is contended that the County Court Judge, in so acting, is not acting in a judicial capacity. But as there is to be an application to him on affidavit, and as he is to decide upon the credibility of the deponent, and as he thereupon issues a summons and commands the attendance of the returning officer, and gives notice to the parties, and as (where, as here, the application was, amongst other things, for a recount) he may have to decide upon important legal questions as to the sufficiency of ballots — questions which have engaged the serious attention of the highest Courts — and as the effect of his decision is to impose an obligation on the returning officer to make a return in conformity therewith, thereby also directly affecting the right of the candidate whom the County Court Judge finds to have the minority of votes, and as he has authority to order and tax costs, it appears to me obvious (taking all the above considerations together) that he discharges judicial functions. See *Reg. v. Owens* (1). In determining the particular point raised by this objection, viz., as to whether the County Court Judge is a judicial officer subject to prohibition, we may fairly enough treat it as if the application for prohibition were either by the returning officer or by the candidate. The fact that what he does is done in relation to

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(1) 2 E. & E. 36.



the election and return of a member of parliament does not, of itself, show that his work is merely ministerial. When the Court tries election petitions, it is doing work in relation to the election and return of members, and what was formerly done by the House of Commons or its committees, but it is none the less acting judicially.

1890.

*Ex parte*

BAIRD.

King, J.

But it is further objected that the matter is within the exclusive jurisdiction of the House of Commons. I am not confident that there is a complete answer to this objection. The effect of prohibition in delaying the return which parliament has been at considerable pains to expedite by minute directions as to time (sec. 64, 5) is a material consideration. In *Theberge v. Laudry* (1) it was said, in a question as to the jurisdiction to decide upon election petitions, that "one of the obvious incidents or consequences of such a jurisdiction must be that the jurisdiction, by whomsoever it is to be exercised, should be exercised in a way that should as soon as possible become conclusive, and enable the constitution of the legislative authority to be distinctly and speedily known."

In support of his contention, Mr. *Gregory* cited the high authority of the Court of Queen's Bench of Ontario: *Centre Wellington Election Case* (2). That case was the converse of this. A Judge of the County Court had begun proceedings upon a recount, and afterwards declined to proceed. Upon application for mandamus, the Court, while thinking that his reasons for not going on were insufficient, declined to compel him on the ground that "the person against whom the writ is asked is (as it were) the officer of another jurisdiction who can exercise control over him if necessary, and to whom and not to the Court he is amenable."

There the Judge of the County Court had jurisdiction, and was an official engaged in the execution of his duties under the election law, and therefore the officer of another jurisdiction. In the present case the learned Judge, in doing what he was about to do, was not (I speak with respect, and with deep sense of his worth and attainments) any more an official under the Elections Act, than if he were proposing a recount and summing up in the County of Kings.

(1) 2 App. Cas. 102.

(2) 44 U. C., Q. B. 132.

1890.

*Ex parte*  
BAIRD.King, J.

But it may be said: "If the Courts may grant a rule *nisi* for prohibition, it may turn out that the authority sought to be prohibited has jurisdiction, and then there would be an interference with the course of the election proceedings."

To my mind this is so; and the only answer I feel capable of making is that the matter is to be judged by the fact. If the authority sought to be prohibited has jurisdiction, then the prohibition proceedings are an unwarrantable interference with the course of the election. If, however, the authority sought to be prohibited is without jurisdiction, then what is done is merely to prevent an illegal obstruction from getting in the way. In such case the proceedings upon prohibition are collateral to the election proceedings.

If the County Court Judge has no jurisdiction, the returning officer can (equally whether there is or is not a prohibition to the County Court Judge) go on and make his return; and, therefore, these proceedings in prohibition do not necessarily have the effect of preventing the constitution of the House from being speedily known.

The entire matters herein discussed are of no practical importance as far as the particular election is concerned, except perhaps as to costs. The case ceased to have anything more than a theoretical importance long before the argument; and the only reason for a decision at all is that it is understood that, in an appeal of another case, their lordships of the Supreme Court of Canada thought that they were entitled to have the opinion of this Court on the matters herein involved.

I may perhaps draw attention to the fact (without at all relying on it as a ground of decision) that, while the Controverted Elections Act relates only to the dealing with the return after it is made, it marks a great constitutional change, and the reversal of the attitude maintained by the House of Commons towards the Courts for upwards of two centuries.

Intelligent democracy welcomes and asserts the supremacy of law. And parliament having given to the Courts the power finally and exclusively to decide upon the ultimate and chief matter, viz., the return, the exercise by the Court of a power to prevent outside interference with the course of the election proceedings (while strictly within the power of the Court, if

what is said before is correct) is at the same time in consonance with the spirit of modern legislation.

I ought to mention another objection taken by Mr. Gregory, viz., that the Court cannot, according to practice, issue an order *nisi* for prohibition in vacation. But that was done in *Ex parte Boyne*, to which Mr. Gregory referred as against his contention; also in *The Queen v. Overseers of the Poor in Queens County*; in the *Danaher Case* and other liquor cases from St. John, and in other cases which establish the practice firmly.

1890.

*Ex parte*  
**BAIRD.**King, J.

WETMORE, J. I agree with the learned Chief Justice that prohibition should issue in this case. For the reasons for my opinion, I refer to my judgment in *Ex parte Baird: In re Ellis* (1).

FRASER, J. I also agree that the rule should be absolute.

PALMER and TUCK, JJ., not having heard the argument, took no part.

*Rule absolute.*

1890.

## EX PARTE BAIRD: IN RE STEADMAN.

*February 13.*

*Contempt—County Court Judge—Dominion Controverted Elections Act—Prohibition—Order Nisi with stay of proceedings—Disregard of by County Court Judge—Costs.*

A writ of prohibition will be granted to restrain a County Court Judge from proceeding under the Rev. Stat. of Canada, cap. 9, relating to Controverted Elections, in a matter where he is acting in excess of his jurisdiction.

Where a Judge of this Court had granted an order *nisi* for a prohibition to restrain a County Court Judge from proceeding to recount the votes given at an election for a member of the House of Commons under the Rev. Stat. of Canada, cap. 8, sec. 64, with a stay of proceedings until the return of the order *nisi*, it is a contempt of this Court for the County Court Judge to proceed with the re-count.

Where the County Court Judge shewed that he acted under the belief that the 64th sec. of the Act required him to proceed as he did, and that he did not intend to act contemptuously, and the prosecutor for the prohibition did not claim costs, no punishment was awarded for the contempt.

See the preceding case, ante p. 162.

On the first day of Easter Term, 1887, *L. A. Currey*, on behalf of George F. Baird, moved for a rule calling upon James Steadman, Esquire, the Judge of the Queen's County Court, to shew cause why a writ of attachment should not be issued against him, for his contempt in not paying obedience to an order *nisi* for a writ of prohibition issued by His Honor Mr. Justice Tuck, to prohibit him from further proceeding with or making a recount or final addition of the votes given for the applicant and one George G. King, at an election held on the 22nd February, 1887, of a member to represent the electoral district of Queens County, in the House of Commons of Canada; and from certifying the result of any such recount or final addition of votes to the returning officer of said electoral district; and also directing that in the meantime, and until further order of this Court, all further proceedings in or with reference to the said recount or final addition of the said votes, and such certificate of the result thereof should be stayed. See *Ex parte Baird* (ante p. 162).

A rule *nisi* was granted, returnable on the second Saturday of term.

April 18, 1888. *Geo. F. Gregory* shewed cause. This Court

has no jurisdiction in prohibition over a Judge of the County Court, in respect to the discharge of duties in election proceedings. Whatever he does in the course of an election in aiding in the return of a member is subject to review in an Election Court on an election petition, or in the House of Commons, and not elsewhere. He is an election officer, and as such is subject to penalties for misfeasance or nonfeasance in his office: R. S. C., cap. 8, sec. 105. Being liable to a penalty if he did not proceed with the recount, he was justified in disregarding the order. Attachment will not lie for disobedience of an order improperly granted: *Reg. v. Ledgard* (1).

1890.

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*Ex parte*  
BAIRD :  
*In re*  
STEADMAN.

*L. A. Currey*, in support of the rule. The only answer that can be made to this application is, that the order of Mr. Justice Tuck was entirely void. Whether it was granted providently or improvidently does not affect the case. Rules *nisi* are often granted and afterwards, upon hearing, discharged; but so long as they stand where there is jurisdiction to make them, they must be obeyed. Sec. 105 is confined to wilful misfeasance or omission in violation of the Act, and the prohibition order would be an answer to any action. It is submitted, however, that that provision applies to such officers as are termed election officers, and not to a County Court Judge in holding a recount. As to the practice in granting the writ, see *Rapalje on Contempt of Court*, 19 and 45. Costs are not asked for.

*Curr. adv. vult.*

The following judgment was now delivered:

**PALMER, J.** This is an application for an attachment against Hon. James Steadman, Judge of the County Court for the County of Queens, for disobeying the order of Mr. Justice Tuck under the following circumstances. There was an election for the return of a member to serve in the Parliament of Canada for said County, at which George G. King and George F. Baird were opposing candidates. On declaration day, the returning officer made a final addition of votes by which it appeared that there were more votes cast for Mr. King than for Mr.

1890.  
*Ex parte*  
BAIRD:  
*In re*  
STEADMAN.  
Palmer, J.  
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Baird; but notwithstanding this, such returning officer decided that Mr. King never was a legal candidate, and therefore declared Mr. Baird elected, and stated that he would return him. Mr. King by his counsel then applied to said Judge of the County Court for a recount under the 64th sec. of cap. 8, R. S. C., who appointed a time and place for such recount, when Mr. Baird, by his counsel, applied to Mr. Justice Tuck for an order to shew cause at the then next term of this Court, why a writ of prohibition should not issue prohibiting the said Judge from holding a Court for such recount, which order the said Judge granted with an order therein that all proceedings should in the meantime be stayed. This order was served on Judge Steadman, who, as he states, believed that Judge Tuck had no power to grant such an order, and that it was his duty to proceed and disregard such order holding the Court in contravention of it, and the question argued before us is: Whether his doing so is a contempt of this Court.

This raises a question of the gravest importance, which requires the most careful consideration. The bottom controversy appears to be: Had Judge Steadman any power to recount the votes under the circumstances? I think he clearly had not. All the power he had in this regard was given him by the 64th section, and by that section one of the following circumstances appears to be necessary as a condition precedent to any authority in the Judge to recount: (1) that the returning officer has improperly counted or rejected ballot papers, or (2) improperly summed up the votes. Neither of these things was done; and if such were alleged in order to give the Judge jurisdiction, such allegations were clearly false, for the only thing complained of by Mr. King was an improper decision that he was not a candidate, and the return of Mr. Baird. Over these the County Court Judge is not given jurisdiction, but the Election Court is by sec. 5 of cap. 9.

I have a clear opinion on this point, although I think it has little bearing on the present question, for if Judge Steadman had jurisdiction in the matter, Judge Tuck may well have the power to make the order he did to put the question involved in the course of adjudication.

Another point taken is, that this Court had no power to

restrain the Courts created by cap. 8 of the Rev. Stat. of Canada, "Election Courts." If it were not for the *dictum* of a most distinguished Judge in the *Centre Wellington Case* I should have thought the matter beyond controversy, for it has been the uniform course, from the foundation, for this Court to see that no Court, or person, exercising judicial functions in this Province exceed their power. The powers given to Judge Steadman are given by statute, and are judicial and are confined to the power so given, and I can find no law or reason why this Court should be relieved of its duty of seeing that he is confined to such powers. If this is not done, we might have two tribunals, the County Court and the Election Court, both attempting to deal with this question, and whose decisions might be contradictory.

On this point I beg to refer to what I said in the case of *The Queen v. Ellis*. But, if this is not so, I do not think it would dispose of the case, for in order to authorize Judge Steadman to disregard the order of Judge Tuck with impunity, that order must be absolutely void; and as this Court has the unquestioned power of granting prohibition, it would be a proper matter at all events for this Court to hear and determine whether the particular circumstances of the case brought it within the power to grant the particular writ asked for or not; and I think it is the undoubted right of this Court, in such a case, to stay proceedings until the matter is disposed of. I do not wish to be understood to say that if Judge Tuck's order was entirely void, it would be any contempt to disregard it. In order to be a contempt, the disobedience or resistance must be to a lawful order of a Court, or Judge thereof. If the Court had no jurisdiction whatever and the order is void, for that reason disobedience is not a contempt; but the fact that an order was erroneously granted by a Court or Judge having jurisdiction, is no reason why it should be disobeyed. It is obligatory until reversed by an appellate Court, and the disobedience of or resistance to such an order is a contempt. As in this case I have no doubt Judge Steadman acted under a mistaken notion of the law, and with no intention of committing a contempt of this Court, I think the ends of justice would have been answered by merely making him pay the costs of this

1890.

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*Ex parte*  
**BAIRD:**  
*In re*  
**STEADMAN.**  


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 Palmer, J.

1890.

*Ex parte*  
**BAIRD:**  
*In re*

**STEADMAN.**

Palmer, J.

application, but as Mr. Baird's counsel has not asked for costs, there will be no necessity for any further proceedings being had in the matter.

SIR JOHN C. ALLEN, C. J. I agree as to the result.

WETMORE, J. I think the Judge has been guilty of contempt. I have no doubt that prohibition should issue. The order *nisi* was properly granted by His Honor Mr. Justice Tuck. The reasons for my conclusion are fully given in my judgment in *Ex parte Baird; In re Ellis* (1), to which I refer, not thinking it necessary to repeat them here.

KING, J. I think that an attachment should issue, and do not think it necessary to do more than refer to my judgment upon the application for prohibition to the same learned Judge.

FRASER, J. I also agree.

SIR JOHN C. ALLEN, C. J. The judgment of the Court will be that Judge Steadman be adjudged guilty of contempt; but as he acted under a misapprehension of the law, and as the applicant's counsel stated he would not ask for costs, no punishment will be awarded for the contempt.



## EX PARTE DAVIDSON.

1889.

June 29.

*Consol. Stat. c. 38.— Examination of Debtor — Refusal of witness to give evidence where Debtor not served with order—Attachment for contempt.*

A County Court Judge has no authority under the Consol. Stat. cap. 38, sec. 20, to examine a person as a witness relating to the property of a judgment debtor liable to be taken in execution, unless the debtor has been served with the Judge's order to appear for the purpose of such examination; nor is such person liable to an attachment under sec. 22, for refusing to give evidence, unless such order for the debtor to appear has been served. (Wetmore and Tuck, JJ., dissenting.)

This was an application for a *certiorari* to bring up an attachment for contempt, issued out of the County Court of Northumberland against the applicant, one William Davidson, for refusing to attend and give evidence upon an application under Consol. Stat. cap. 38, for the examination of a judgment debtor.

An order *nisi* having been granted by His Honor Mr. Justice Fraser at Chambers,

April 15, 1889, *Geo. F. Gregory* shewed cause, and

*A. A. Davidson, Q. C.*, argued in support of the rule.

The material facts in the case, and the arguments of the counsel, are sufficiently stated in the judgment.

*Cur. adv. vult.*

The following judgments were now delivered :

KING, J. This is an application for a *certiorari* to bring up an attachment for contempt issued out of the County Court of Northumberland against the applicant, for refusing to attend and give evidence upon an application under Consol. Stat. cap. 38 for the examination of a judgment debtor. Judgment in the Supreme Court had been recovered by John and Richard Young against one James MacMahon, and the judgment creditor had applied to the Judge of the County Court of Northum-

1889.

Ex parte  
DAVIDSON.King, J.

berland, under sec. 20 of cap. 38 for an order that McMahon, the judgment debtor, should be orally examined on oath before such Judge of the County Court as to any and what property he had, which, by law, was liable to be taken in execution on such judgment. The judgment creditor also obtained from the County Court Judge an order, under sec. 21, requiring Davidson (the applicant for the *certiorari*) to attend such examination as a witness on behalf of the judgment creditor. This order was duly served on Davidson and conduct money paid him. By sec. 21 it is enacted that upon such things being done it shall be the duty of the person so served to attend such examination and give evidence thereat. Davidson did not attend in person at the time and place named in the order, but an attorney attended for him and claimed that as the judgment debtor was out of the Province, and had not been served with the order for his examination, and had not appeared or even been called for, the witness Davidson was not bound to appear and give testimony, and that it was only the examination of the defendant that he was required to attend; and the attorney further offered to read affidavits to show that the judgment debtor had been for some years, and was then, resident in the North West territories, and could not have been served with any order for his examination, but the learned Judge refused to hear such affidavits.

Sec. 22 of cap. 38 declares that "any witness so served, refusing to attend and give evidence, shall be punishable by attachment for contempt, which attachment may issue out of the County Court on the order of a Judge thereof on affidavit of the facts."

Afterwards an order *nisi* was issued out of the County Court, calling upon Davidson to shew cause why an attachment should not issue against him for contempt in disobeying an order issued by the Judge as aforesaid for an examination under the provisions of chapter 38 Consol. Stat., bearing date the 1st day of June, A. D. 1888.

On the return of the order *nisi* the judgment creditor and Davidson appeared by counsel, and the like contention was made as before. The learned Judge decided against the contention and made the rule or order absolute for the writ of

attachment for contempt. Thereupon application for *certiorari* was made and an order *nisi* granted by Mr. Justice Fraser, and upon the return it was argued by Mr. *Gregory* in shewing cause, and by Mr. Davidson for the applicant.

1889.

*Ex parte*  
DAVIDSON.

King, J.

Mr. *Gregory* contended that when the Judge appoints a time and place for examination, the witness is to attend; that the attendance of, or service of order on, the judgment debtor is not a condition precedent to the jurisdiction of the Court; that on the assembling of the Court the judgment creditor may, or may not, examine the debtor, as he pleases; that he has the right to examine any witness, and may be content therewith; that a witness may not know but that the debtor may attend, and he cannot require the examination of the debtor prior to his own evidence being taken; and lastly, that under sec. 23, the place for the applicant to complain of the attachment was before the County Court Judge, the section declaring that "the Judge of the County Court shall have the right, on application of the debtor, or any witness, as aforesaid, to set aside any attachment, if the same have been improperly obtained," etc.

On the other hand, Mr. Davidson contended that an examination in fact of the judgment debtor must take place as a condition of the witnesses' obligation to attend and give evidence; and he relied upon the use of the word "such" as referring to an examination in fact of the debtor, in the clause which requires the witness "to attend such examination and give evidence thereat." He also contended that the facts showed that there was no intention on the part of the judgment creditor to examine the defendant.

Several cases were cited by Mr. *Gregory* which arose under the English Companies Act, 1862, by sec. 115 of which a Judge upon winding up proceedings is empowered to summon persons for examination as to the trade, dealings, estate or effects of the company.

In the case of *In re Gold Co.* (1), where the main decision was that the Court of Appeal would not interfere with a Judge's exercise of discretion unless in an extreme case, it was stated as a *semble* that a person so summoned to be examined has no *locus standi* to appeal against the order directing him to

(1) 12 Ch. D. 77.

1889.

Ex parte  
DAVIDSON.King, J.

attend for examination. There an order of a Judge was made on behalf of a contributory, with a view to fixing the directors with liability under sec. 165 of the Act. Jessel, M. R., says: "It is not suggested in this case that Mr. Carter's application is otherwise than *bona fide*, by which I mean that he intends to prosecute the claim against the directors and the secretary, and that he thinks the evidence of these witnesses material to help him to prosecute it. In cases where the process of the Court is abused, I agree that any person who is affected by such an abuse may bring the case before the court. But it appears to me that a mere witness ordered to be summoned under the 115th section has no right to apply to the Court to discharge that order. He is not more nor less than a mere witness, like a witness in any other case; but he has this protection, that in an ordinary action the subpoena issues as a matter of right at the option of the litigant, whereas in this case it cannot be issued without the opinion of the Judge of a superior Court being obtained that it is a proper case in which to issue a summons, which comes in lieu of a subpoena."

In *Whitworth's Case: Re Silkstone and Dodworth Coal and Iron Co.* (1), where an order issued under sec. 115 of the Companies Act, 1862, a witness, acting on advice of counsel, refused to answer the questions put to him, it was held (by the Court of Appeal) that the only ground on which a witness summoned to attend for examination can contest the validity of the summons is a want of jurisdiction to issue the summons or make the order. If the jurisdiction exists, a witness has no *locus standi* to appeal against the order.

The question in the cases just cited arose upon appeals from the orders. It does not appear that there was any question of attachment in the latter case, or any proceeding based on the refusal to answer which of itself required compliance with statutory requirements. In the case before us, the applicant not only contests the validity of the order requiring him to attend and give evidence, but he also (and more pointedly) contests the validity of the order for attachment.

The question next to be considered is whether there is a want of jurisdiction in the County Court to do any of the

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(1) 19 Ch. D. 112.

things done by it in respect of these proceedings ending in the attachment. There can, I think, be no doubt that it had power to issue the order for the attendance of Davidson to testify.

1889.

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*Ex parte*  
DAVIDSON.

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King, J.

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Then as to meaning of the words "such examination," as used in sec. 21, I feel sure that their meaning cannot be extended to cover the case of an examination, where the order for examination of the debtor has not been perfected by service, or service waived by the debtor's appearance. That could in no sense be considered an examination, and in no sense be considered a legal proceeding as against the judgment debtor. The judgment creditor having failed to bring the judgment debtor before the Court, and he not appearing voluntarily, no proper legal proceeding could go on. The object of the examination of the witness Davidson was to affect the rights of MacMahon. How could this be done when MacMahon was not summoned before the Court, and when he did not appear without summons? In going on, the Judge would be acting *ex parte* where the law requires the proceedings to be upon notice, and the proceedings would be *coram non judice*. I think, therefore, that when it appeared, as it certainly did abundantly appear, that MacMahon was not present, and had received no notice of the examination, the Judge had no right or jurisdiction to go on and seek to compel Davidson, the witness, to give evidence or to do anything else. At one time I thought that a good distinction might lie between Davidson's refusing to appear and refusing to testify, but the case is not one for splitting of hairs. The irregularity of the proceeding was plain. The object involved in defendant's refusal, on advice of counsel, to attend and testify was substantially a refusal to give evidence. His testimony was the object sought for by the judgment creditor, and which the witness objected to. It was the substantial difference between the parties. Further, as the alleged default was in refusing to attend the examination, and from what I have said there was no examination in fact or potentially or in any sense — (by this, I mean no right to continue the proceedings at all without service, and in the judgment creditor's absence), there was no refusal to attend any legal proceedings, the examination at once became a pretence and a sham. Further, I think

1889.

Ex parte  
DAVIDSON.King, J.

that the whole force of the word "attend" is in the attending as a witness, as mentioned in sec. 21.

The language of Jessel, M. R., in *Re Gold Company*, already cited, applies here, as a description of these proceedings. They were not *bona fide* for the purpose of promoting the examination of MacMahon. The order for examination of MacMahon was got out, not with any intention of serving it, or getting his examination in fact, but to appear to comply with preliminaries of the statute, and so get the evidence of Davidson. The affidavit issued on the attachment proceedings shews this.

As to the objection that application should first be made to the County Court Judge under sec. 23, I have been impressed by it; but in the view I take of it, the proceedings before the County Court Judge were so clearly vicious throughout on the alleged examination, and there was so clearly no default of Davidson, that I think the proceedings may well be brought up in this way and at this time.

I therefore think the attachment should be set aside.

FRASER, J., after referring to the facts, continued:

This is an appeal against the judgment of the County Court Judge making absolute the rule for attachment. The plaintiffs contended that the judgment of the County Court was right, and ought not to be reversed.

1st—Because the service of the order on the debtor, or his attendance, was not necessary to constitute the Court.

2nd—That on the assembling of the Court, the plaintiffs might, or might not, examine the debtor, but might examine any witnesses.

3rd—That the witness cannot know but that the debtor may attend.

4th—That under sec. 23 the parties ought to go to the County Court Judge to set aside the attachment.

It seems to me that the 20th section looks to the examination of the judgment debtor at a time and place to be fixed for the purpose by the County Court Judge. To give the Judge power to hold the examination, a copy of his order appointing the time and place for the examination, must be served upon

the debtor. If, however, the debtor appear, that would be sufficient to warrant the Judge in proceeding with the examination. If the debtor do not appear, and has not been served with the order, I am at a loss to see what power the Judge has to go on with any examination; in other words, he has no jurisdiction to open his Court for the taking and holding of the oral examination mentioned in the 20th section.

The Davidsons were only required to attend as witnesses, and what they were required to attend was the examination, (i. e., such examination), as is mentioned in the 20th section; not their examination but the examination of the debtor, for the order did not require their examination but the examination of the debtor; and the order served upon them required them to attend the examination of the debtor and give evidence thereat.

If the provisions of the Act would enable the creditor, without any notice to the debtor, to examine persons other than the judgment debtor as to any and what property the debtor had, which, by law, was liable to be taken in execution on the judgment, the provision of the 20th section providing a time and place for the examination of the debtor, would appear to be a useless proceeding where it was not the intention to give the debtor any notice, and where, as in the present case, he was without the limits of the Province.

In my opinion, the County Court Judge could not proceed with the examination without its appearing to him that the debtor had been served with the order, or without the appearance of the debtor before the Judge under the order; which would practically be a waiver of the service. To hold otherwise would be to hold that a proceeding could take place affecting the rights of the debtor, without any notice to him, which would be a proceeding contrary to natural justice.

At the argument, *In re Silkstone and Dodworth Coal and Iron Company* (1), *In re Gold Company* (2) and *In re Bank of Hindustan, China and Japan* (3), were relied upon as authorities in support of the plaintiff's contention.

In all these cases there was authority not only to issue the orders, but to take the examination of the persons appealing.

1889.

*Ex parte*  
DAVIDSON.

Fraser, J.

(1) 19 Ch. D. 118.

(2) 12 Ch. D. 77.

(3) L. R. 13 Eq. 178.

1889.  
*Ex parte*  
DAVIDSON.

FRASER, J.

In the present case, I admit there was authority in the County Court Judge to make the orders he did requiring the Davidsons to attend the examination and give evidence thereat; but when they did attend, (which in my opinion they did, when counsel appeared for them, because their personal presence was not essential, and their absence was not a contemptuous act on their part unless there was power in the Judge to examine them) there was no jurisdiction in the Judge to order them to be examined, because he had no jurisdiction to put them under examination.

If there was a want of jurisdiction to proceed with the examination, then I fail to see in what way the Davidsons have been guilty of contempt.

In the *Silkstone Case*, while the Court held that the witness had no *locus standi* to appeal against the order for his examination if jurisdiction existed, yet they, in effect, determined if there was no jurisdiction the witness was not obliged to attend.

Jessel, M. R., on p. 120, says that the only possible ground upon which a witness could contest the right to examine him would be, that the Judge had no jurisdiction, as he puts it, "to order him to attend," and if the present case had been before him he might well have added, if the witness did attend, the Judge had no jurisdiction to order him to be examined.

The attachment was issued under the 22nd sec., cap. 38, Consol. Stat., which is as follows:

"Any witness so served, refusing to attend and give evidence, shall be punishable by attachment for contempt, which attachment may issue out of the County Court on the order of a Judge thereof, on affidavit of the facts; and such witness shall be liable to the party requiring his attendance in an action for damages, as in case of non-attendance under a subpoena."

Messrs. Davidson, in my opinion, did not practically refuse to attend, but they declined to give evidence because they were advised, and I think rightly advised, that the Judge of the County Court had no jurisdiction to hold the examination; but after all, even if they did not attend as contended for by



the counsel for the plaintiffs in the suit, the substantial offence for which a witness in such a case as theirs would be liable to be punished by attachment, would be the refusal to give evidence, and this they were justified in doing because the Judge, for the reason I have stated, had no jurisdiction to call upon them to testify.

It would appear to me that the Davidsons were not obliged to apply to the Judge of the County Court under the 23rd sec. to set aside the attachment before coming to this Court—that section was not intended to apply to a case where the Judge of the County Court had ordered the attachment after notice to the parties, and after full argument of the matter; but rather to a case where an attachment had been issued *ex parte*, and had been obtained upon a misrepresentation of the facts, or had otherwise been improperly obtained.

I think the rules for a *certiorari* should be made absolute.

TUCK, J. The question to be determined in this application arises under cap. 38, secs. 20 and 21, Consol. Stat.

John Young recovered a judgment against James MacMahon, and applied to William Wilkinson, Esquire, Judge of the County Court of Northumberland, to examine the defendant, and obtained orders for the examination of William Davidson and James Davidson as witnesses. Although the orders were served and conduct money was paid them, they did not obey the orders. They did, however, appear by attorney, and said that the defendant, MacMahon, was out of the Province, and had not been served; therefore they were not obliged to attend. Affidavits were produced, which show that the defendant was out of the Province when the order for his examination was made. For refusing to attend and give evidence, the County Court Judge made an order for attachment against them for contempt.

At first I had some doubts as to the *locus standi* of the witnesses under secs. 21 and 22 of cap. 38; whether or not they could be punished for contempt where the judgment debtor had not been served with the Judge's order. By sec. 20 power is given to a Judge of the County Court, whenever a person has obtained a judgment in the Supreme Court or

1889.

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*Ex parte*  
DAVIDSON.

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FRASER, J.  

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1889.

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*Ex parte*  
DAVIDSON.

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Tuck, J.  

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any County Court, to make an order that the judgment debtor shall be orally examined on oath before such Judge, as to any and what property he has which by law is liable to be taken in execution on such judgment; and by sec. 21, the Judge, or other person authorized to hold and take an examination under the chapter, is empowered to make an order requiring any person to attend such examination as a witness on behalf of either of the parties. On the proper service of this order on the witness, with tender of conduct money, it is made his duty to attend such examination and give evidence. If he refuse to attend and give evidence, sec. 22 provides that he shall be punishable by attachment for contempt, on the order of a Judge of the County Court.

Mr. *Davidson*, for the witnesses, contends that they were not obliged to attend and give evidence unless the debtor, *MacMahon*, had been actually served with the order, and he was to be examined on oath at the time and place named for the examination. The effect of his argument is, that a Judge of a County Court has no jurisdiction to enforce an order for the attendance of witnesses unless the debtor has been served with the order for his examination. I think this argument is not a sound one, for several reasons. It is clear that the two orders may be made at the same time. When the Judge makes an order and names the time and place for the examination of the judgment debtor, he may also summon witnesses to attend and give evidence. It is not for them to know or to inquire where the debtor is, or whether or not he has been served with the Judge's order. It is their duty to obey the process of the Court. Whatever argument might be made as to the power of the Judge to proceed with the examination of witnesses in the absence of the debtor, or in case he had not been served with the order, is entirely outside of the present question. When the order was made for these persons to attend and give evidence, the Judge had full power to make it. His power to punish for disobedience of this order is not lost because the principal person has not been served, or having been served, is not present at the examination. The Court may be constituted without the presence of the debtor or the service of the order on him. I think even if the debtor were

present the examination might proceed, and other witnesses be required to give evidence, without the debtor being sworn or making any statement. It might be reasonable and prudent for the judgment creditor not to examine the judgment debtor, and he is not obliged to do so unless he please. In such a case, if this motion were to succeed, witnesses, properly served, who refused to attend, could not be punished for contempt. I incline to think that the words "examination of the said debtor," do not mean alone that he shall be orally examined on oath, but a general examination into the state of his affairs, and that this may take place, whether the debtor is examined or not.

But apart altogether from what is the proper construction of the statute, I hold that inasmuch as the Judge of the County Court had jurisdiction to make the order requiring the attendance of these witnesses, it was the duty of the Davidsons to obey it, and for their disobedience they are liable to be punished by attachment. It is important that the process of the Court, acting within its powers, should be respected, and that those who treat it with contempt should be punished.

Another objection made to this motion is, that the Davidsons could have applied to the Judge of the County Court to set aside the attachment. This power is given by section 23 of the Act. I do not consider this objection, because, I think, for the other reasons before stated, the rules must be discharged.

WETMORE, J. I agree with the judgment of my brother Tuck. I also think that the other objection is fatal to this application. Sec. 23 provides a remedy in case an attachment has been improperly granted, and until the party aggrieved avails himself of the mode there provided for setting aside an attachment, he should not be allowed to come to this Court. The rule is that where there is an adequate statutory remedy, this Court will not interfere by *certiorari*. No exceptional circumstances have been shown here to take the case out of that rule.

SIR JOHN C. ALLEN, C. J. When application is made to a County Court Judge, Clerk of the Peace or Commissioner, under sec. 20 of chap. 38 of the Consol. Stats., by a person

1889.

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*Ex parte*  
DAVIDSON.

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Tuck, J.

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1889.

Ex parte  
DAVIDSON.Allen, C. J.

who has obtained a judgment in this Court, or a County Court, for an order that the judgment debtor may be examined as to any property he has liable to be taken in execution on the judgment, such Judge, etc., has jurisdiction to make an order for the examination of the debtor, and has also jurisdiction to make an order requiring any person to attend as a witness at such examination; and the person so summoned, if the necessary conduct money is paid, or tendered to him, is bound to obey the order, and attend at the time and place appointed.

But if the judgment debtor has not been served with the order for his examination, or, being served, does not attend before the Judge, then, I think, the Judge has no jurisdiction to proceed any further in the matter, and a person summoned to attend as a witness would not be guilty of a contempt under sec. 22, in refusing to be sworn and answer questions, because the jurisdiction of the Judge had ceased by the non-appearance of the judgment debtor.

Though the persons summoned as witnesses did not actually appear before the Judge, they did attend at the time and place appointed, and, by their counsel, objected to being examined because the judgment debtor had not been served with the order. Practically, they obeyed the order to attend, which, I think, is all they were bound to do.

In making these observations I assume that the application for the order for the examination of the debtor was made *bona fide*. If it was not, and there was no intention of examining the debtor, but the object was only to examine the persons summoned as witnesses, then, I incline to think that the whole proceeding would be *coram non judice*.

PALMER, J., not having heard the argument, took no part.

*Rule absolute.*

GALLAGHER v. THE MUNICIPALITY OF  
WESTMORLAND.

1889.

October 18.

*Municipal Corporation—County Valuator—Wrongful dismissal—  
Liability of Corporation—Pleadings—Malice—Power of two  
Valuators to act—Power of County Council to contract with  
Valuators.*

G. being duly qualified, was appointed by the County Council of Westmorland, one of the Valutors of the County, the term of office being for three years, by the Consol. Stat. cap. 100, sec. 35. During the term, the Council dismissed G. on the ground that he had, since his appointment, ceased to be a ratepayer on property, cap. 99, sec. 65 of the Statutes declaring that no person should be eligible to be appointed to any County office unless he was a ratepayer on property or income, and had paid his rates for the previous year. In an action by G. against the Municipality of the County for a wrongful dismissal, —*Held* on demurrer to the declaration :

1. By PALMER, KING and FRASER, JJ., that a count alleging that the defendants wrongfully and maliciously dismissed the plaintiff was good.

By ALLEN, C. J., that as the Council had exceeded its power in dismissing the plaintiff, the municipality was not liable.

By TUCK, J., that though the members of the Council who voted for his dismissal might be liable for his wrongful dismissal, the municipality was not liable.

2. By ALLEN, C. J., KING and FRASER, JJ., that a count stating a wrongful dismissal of the plaintiff, without stating that it was done maliciously, was good.

By PALMER, J., that malice must be alleged in order to make the defendants liable.

By TUCK, J., that the wrongful dismissal was, at most, an error in judgment of the Council, and that the defendants were not liable.

3. Where the statute provides for the appointment of three valutors, the Board of Valutors must be full before they can act ; therefore a count alleging the wrongful refusal of the Council to allow the plaintiff and one other valuator to proceed with the work of valuation, is bad.

4. By ALLEN, C. J., PALMER and FRASER, JJ., that a count alleging a contract by the Council to employ the plaintiff as valuator for the term of three years, for certain reasonable remuneration ; that the plaintiff entered into the service of the defendants as such valuator, and that they afterwards wrongfully dismissed him, stated a cause of action.

By KING and TUCK, JJ., that the appointment of valutors was obligatory on the Council by statute, and was the exercise of a public trust, and, therefore, did not create any contract between the plaintiff and the defendants, for breach of which an action would lie.

Plea amounting to the general issue. Setting aside plea as embarrassing under Consol. Stat., c. 37, s. 88.

*Declaration* :—Patrick Gallagher by &c., sues the Municipality of Westmorland.

1. For that heretofore and before the committing by the defendants of the grievances hereinafter mentioned, and before

1889.  
GALLAGHER  
v.  
THE MUNICIPALITY OF  
WESTMORLAND.

and at the time of the election and appointment of the plaintiff as a Valuator of the County of Westmorland, hereinafter mentioned, the plaintiff was and still is a British subject, and an inhabitant of, and ratepayer upon real and personal property and income in said County, and thereupon, at the semi-annual meeting of the County Council of the Municipality of Westmorland, held in the month of January, 1885, the plaintiff having paid his rates for the year previous to said month of January, and being duly and in all respects qualified and eligible to be appointed a Valuator of said County; the County Council of the said Municipality and the said defendants on the twenty-fourth day of said month of January, duly and rightly proceeding therein, made resolutions and orders in the words and figures following: (The resolution appointing the plaintiff a Valuator was here set out).

Whereby the said plaintiff was duly chosen, elected and appointed a Valuator for said County of Westmorland, for the three years then next ensuing; which said election and appointment the said plaintiff thereupon accepted and was and has ever since been and still is ready and willing to act as such valuator and to perform the duties of said office, and to which said office, and the discharge of the duties thereof, there appertains and of right belongs, divers large fees and emoluments which would have come and accrued to the said plaintiff had he been permitted to continue to act as such valuator. That the said defendants and said County Council, at the semi-annual meeting of said Council held in the month of January, 1886, illegally, wilfully and improperly made and passed orders and resolutions of said County Council in relation to the said plaintiff and in relation to his said office, in the words and figures following: (The resolutions displacing the plaintiff on the ground that he had ceased to be a ratepayer in the County, and appointing Early Kay in his place, were here set out.)

And wrongfully and illegally and maliciously and with intent to injure the plaintiff, and deprive him of his just rights, fees, dues and emoluments and to prevent him discharging the duties and labours of the said office of Valuator, dismissed, displaced and removed the said plaintiff from his said office as Valuator of the said County, and appointed or attempted to

appoint one Early Kay, as a valuator of said County in the room and stead of the said plaintiff, and wrongfully and illegally interfered with the plaintiff in his said office, and prevented him from exercising the duties thereof, as he lawfully had a right to do; whereby the said plaintiff was forced and obliged to and did necessarily pay, lay out and expend a large sum of money, to wit, the sum of five hundred dollars of lawful money of Canada, and also incurred and became liable to pay other monies, to wit, the further sum of five hundred dollars in fees to counsel, attorney, solicitors and agents in obtaining from the Supreme Court of New Brunswick, orders, writs and rules to quash and set aside the said orders and resolutions so displacing the said plaintiff and appointing the said Early Kay as such valuator, and in being re-instated in his said office as valuator of said County of Westmorland, and in preventing the said Early Kay from acting as such valuator, and the plaintiff also in and about the proceedings aforesaid, lost much time and labour, and paid large sums of money, to wit, the further sum of one hundred dollars in travelling and other necessary expenses in connection therewith: and by reason of the premises and wrongful acts of the said defendants the said plaintiff was prevented from making any valuation, and was also deprived of the fees and emoluments of his said office and was greatly injured in his name, credit and circumstances, and was also otherwise greatly injured and damnified.

2. And also for that the plaintiff was one of the valutors of the County of Westmorland, duly appointed by the County Council of said County and Municipality of Westmorland for the three years next following the twenty-fourth day of January, 1885, and thereupon it became and was the duty of the said defendants to suffer and permit the said plaintiff and the other valutors of said County to make a valuation of the property and income in the several parishes of the County of Westmorland in the year 1886, as provided by law, and though the plaintiff was ready and willing to proceed with said valuation, together with the other valutors in said last mentioned year, and from the performance and making of which valuation large profits and gains, fees and emoluments would have arisen and accrued to the plaintiff; yet the said

1889.

GALLAGHER  
v.  
THE MUNICIPALITY OF  
WESTMOR-  
LAND.

1889.  
GALLAGHER  
v.  
THE MUNICIPALITY OF  
WESTMORLAND.

defendants wrongfully and illegally interfered with and prevented the plaintiff from proceeding with or making or taking any part in said valuation and acting as such valuator, and illegally and improperly discharged and dismissed the plaintiff from his said office, whereby the plaintiff not only lost and was deprived of all his fees and emoluments of said office, but was also put to large expense and costs in being restored to his office as valuator, and other expenses in connection therewith, and was otherwise injured and damnified.

3. And also for that the said plaintiff heretofore and at the time of the committing of the grievances by the said defendants hereinafter mentioned, the plaintiff was a valuator for the said County of Westmorland, and duly qualified to act as such valuator, and one Patrick Hebert was also a valuator of the said County, and duly qualified to act as such, and it was the duty of the said plaintiff and the said Hebert as such valutors to make a valuation of the property and income in the several parishes in the said County, and for that purpose to furnish the assessors of rates of the several cities, towns and parishes in the said County, liable to be rated for County purposes with schedules or forms with printed headings and with columns to be filled as is provided by the statute and Act of Assembly in such case made and provided, and there then were and still are in the said County and Municipality, cities, towns and parishes in which there was and is property and income and persons liable to be rated and assessed for County purposes, which duty and labour the said plaintiff and said Hebert, as such valutors, did duly perform and fulfil, and such forms and schedules were duly delivered to and received by said assessors; and it was and is the duty of the said assessors, upon receiving such forms or schedules, to proceed to ascertain by diligent enquiry and by examination the names of all persons liable to be rated and their taxable property and income and the extent, amount and nature of the same, and to complete and fill in said schedules or forms and to return the same signed, to the said plaintiff and said Hebert as such valutors, whereupon it was the duty of the said plaintiff and said Hebert as such valutors to revise such schedules and make up a list of the persons liable to be rated in respect of real property,



personal property or income, and the value of the real and personal property and income of such persons; for which duties and services the said plaintiff was entitled to be paid a reasonable sum and remuneration, yet the said defendants and the said County Council well knowing the premises, did by themselves and their warden and officers wrongfully, wilfully and unlawfully instruct, or cause to be instructed, the said assessors not to make, fill up or complete said forms or schedules or to return the same to the said plaintiff and said Hebert, or either of them, and the said assessors in consequence thereof did not and would not fill up, complete and return the said lists to the said valuator, but neglected and refused so to do, whereby and by reason thereof the said plaintiff and Hebert were hindered and prevented from discharging and performing their duties in that behalf, and were unable to complete said lists or the valuation contemplated and required by law, whereby the plaintiff lost and was deprived of certain fees and dues for his labour, and was hindered and prevented from earning certain large fees, compensation and rewards for his services as such valuator in case the valuation had been completed as contemplated and provided by the statute and Act of Assembly in such case made and provided, and was otherwise greatly injured and damnified.

4. And the plaintiff also, by leave of a Judge of this Honorable Court, for that purpose first given and granted, sues the defendants for that in consideration that the plaintiff being duly qualified in that behalf, at the special instance and request of the said defendants, would enter into the service of the defendants as a valuator of the County of Westmorland and serve the defendants for three years from the twenty-fourth day of January, 1885, in the capacity of a valuator of said County, for certain reasonable reward and remuneration to be paid by the defendants to the plaintiff therefor, the said defendants promised the plaintiff to retain him in the said service in the capacity and on the terms aforesaid, during the said three years, and to permit and suffer the plaintiff to act as such valuator and discharge his duties as such for said term of three years, and to make the valuation contemplated and provided for by law, and the plaintiff thereupon entered into the

1889.

GALLAGHER  
v.  
THE MUNICIPALITY OF  
WESTMOR-  
LAND.

1889.  
GALLAGHER  
v.  
THE MUNICIPALITY OF  
WESTMOR-  
LAND.

said service of the defendants in the capacity of such valuator and on the terms aforesaid, and so continued therein for a part of said term of three years, to wit, until the twenty-second day of January, 1886, and until the breach of the said promise hereinafter alleged, and was always ready and willing to continue in the service during the remainder of said term of three years, whereof the defendants always had notice: and all conditions were fulfilled, and all things happened, and all times elapsed to enable the plaintiff to hold said office and discharge the duties thereof, and to earn and receive the fees and emoluments therefor; yet the defendants, long before the expiration of said term of three years, to wit, on the twenty-second day of January, 1886, wrongfully, illegally, wilfully and maliciously dismissed the said plaintiff from the said service and refused to retain the plaintiff therein for the remainder of said term of three years, or to permit him to perform his duties as said valuator, whereby the plaintiff lost and was deprived of the wages and profits, fees and remuneration which he would have derived from being retained in said service and acting as such valuator for the remainder of said term of three years; and was also forced and obliged to, and did necessarily incur large expenses and costs, paid, laid out and expended a large sum, to wit, \$500, in and about setting aside and quashing the orders made by the said County Council removing the plaintiff from said office and appointing one Early Kay thereto, and in being reinstated in his said office and service and employment aforesaid, and in correcting the books and minutes of the said County Council in that respect; and was otherwise injured and damnified.

The defendants pleaded and demurred to the several counts of the declaration.

Grounds of demurrer to the first count:

1. This action cannot be sustained without proof of malice; and the defendants are incapable of such malice as would sustain the action.

2. If the members of the Council acted maliciously in removing the plaintiff from office, they might thereby render themselves liable, but the defendants would not be liable.

3. The defendants are not liable for the acts of the County Council. 1889.

4. The resolution and proceedings set forth in the declaration show a good cause for the dismissal, and the plaintiff was removed for that cause.

GALLAGHER  
v.  
THE MUNICIPALITY OF  
WESTMORLAND.

5. The Council having the power to appoint, has also the power to dismiss the plaintiff without cause; and he held his office at the pleasure of the Council.

6. The plaintiff does not allege that he was qualified as a ratepayer to hold the office of valuator at the time of his displacement in January, 1886.

7. In dismissing the plaintiff, the Council acted judicially in a matter within its jurisdiction and control, and the defendants are not therefore liable for what is error in law or mistake in procedure.

8. The resolutions set out show on their face an entire absence of malice.

9. If the Council had no power under any Act of the Legislature to dismiss the plaintiff, either without cause or for the cause assigned, then they were acting beyond the authority delegated to them, and their act was *ultra vires*, and the defendants would not be liable.

To the second count, the grounds of demurrer were:

1. This action will not lie without malice, and none is alleged.

2. The defendants are incapable of such malice as is requisite to sustain this action.

3. If the members of the Council, in removing the plaintiff from office, acted unlawfully or maliciously so as to give the plaintiff a right of action for any injury he suffered, it would be a right against themselves, personally, and not as against the defendants.

4. The defendants are not liable for the acts of the County Council.

5. The proceedings set forth and the resolutions show good cause for the dismissal, and the plaintiff was removed for that cause.

6. The Council having the power to appoint, had the power

1889.  
GALLAGHER  
v.  
THE MUNICIPALITY OF  
WESTMOR-  
LAND.

to dismiss the plaintiff without cause, and he held his office at the pleasure of the Council.

7. The plaintiff does not allege that he was qualified as a ratepayer to hold the office of valuator at the time of his dismissal in January, 1886.

8. In dismissing the plaintiff, the Council acted judicially with reference to a matter within its jurisdiction and control.

9. If the Council had no power under any Act of Legislature to dismiss the plaintiff, either without cause or for the cause assigned, then they were acting beyond the authority delegated to them, and their act was *ultra vires*, and the defendants would not be liable.

To the third count the grounds of demurrer were :

1. Two valutors cannot act ; and therefore if the assessors refused to act on their notices it would constitute no cause of action.

2. No such duty as that alleged was or could be imposed upon the two valutors, and their act is the act of the board, which, in order to act at all, must be full.

3. No valuation was made within the meaning of the Act, and no services performed which would entitle the plaintiff to make a claim upon the Council for compensation. No such claim can be maintained by plaintiff as valuator except under section 104 of chap. 100 Consol. Stat. ; and no application has been made by plaintiff to the County Council for such compensation, nor has any allowance been made therefor by the Council, or refused to be made.

The four other objections to the count were similar to the 1st, 2nd, 4th and 9th objections to the second count.

To the fourth count the grounds of demurrer were :

1. The plaintiff could only become a valuator by appointment by the County Council under the authority of chapter 100 of the Consol. Stat. and amending Acts ; that no claim by the plaintiff could arise against the defendants except under section 104 of that chapter ; and no application has been made by the plaintiff to the County Council for compensation, nor has any

allowance been made therefor, or refused to be made by the Council. 1889.

2. The defendants being a public municipal corporation with limited powers, could not lawfully contract as alleged.

GALLAGHER  
v.  
THE MUNICIPALITY OF  
WESTMORLAND.

3. The defendants are not answerable to the plaintiff for the act of the County Council in dismissing him from said office. If the plaintiff was illegally, wrongfully, wilfully and maliciously dismissed, the Council would be individually responsible, and not the defendants.

The defendants pleaded to the first count of the declaration:

1st. Not guilty.

2nd. That after the plaintiff had been appointed a valuator, and on and before the 21st day of January, 1886, he was not a ratepayer upon real and personal property and income in the County of Westmorland, and he had not paid his rates for the year previous to the said month of January, 1886, whereby he became disqualified from acting, or longer continuing a valuator, and in consequence of such disqualification he became, and was liable to be removed from the said office of valuator; and that the County Council of the said Municipality, defendants above named, by reason of such disqualification, and for the cause aforesaid, and under and by virtue of the power in them vested, without malice, or any intent to injure the said plaintiff, removed him from the said office of valuator, and dismissed him from the same.

3rd. That after the plaintiff had been appointed to the office of valuator, and before the 21st day of January, 1886, he became and was disqualified from holding the said office, and by reason thereof, and for that cause, the County Council of the Municipality, the above named defendants, without malice or any intent to injure the plaintiff, removed him from the said office, and dismissed him from the same.

4th. That the plaintiff held the office of valuator only during the pleasure of the County Council of the defendants, and the said Council, on the 21st day of January, 1886, signified their pleasure that he should no longer hold the said office,

1889. and without malice or any intent to injure him, removed him from the said office.
- GALLAGHER**  
**v.**  
**THE MUNICIPALITY OF**  
**WESTMORLAND.**
- 5th. That the plaintiff was appointed a valuator by the County Council of the defendants, and he was therefore liable to be removed from the said office by the said Council on good cause shewn, and being so liable it was in the month of January, 1886, charged against him that he ought not to be permitted to continue to hold the said office, for the cause that he was not then a ratepayer on real or personal property in the said County of Westmorland, and that he had not paid his rates for the year previous to the said month of January, whereupon said Council, as by law they were authorized to do, proceeded to investigate the said charge, and did investigate, hear and determine the same and adjudicated upon the same that the plaintiff should, for the cause aforesaid, be removed from the said office of valuator, and they accordingly did remove him from the same; and that in taking such proceedings for the investigation of the said charge and for the plaintiff's removal and in hearing and determining and adjudicating upon the said charge, the said Council acted judicially and to the best of their judgment and without malice or any intent to injure the plaintiff.
- 5th. That they did not dismiss, displace and remove the plaintiff from his office as valuator, as alleged.
- 9th. To the second count: That the defendants did not discharge and dismiss the plaintiff from his office of valuator as alleged.
- 10th. To the second count: That after the plaintiff had been appointed a valuator, and on and before the 21st day of January, 1886, the plaintiff was not a ratepayer upon real and personal property and income in the County of Westmorland, and had not paid his rates for the year previous to the said month of January, 1886, whereby he became disqualified from acting or longer continuing a valuator; and in consequence of such disqualification he became and was liable to be removed from the said office of valuator; and that the County Council of the Municipality of Westmorland, by reason of such disqualification and for the causes aforesaid, and by virtue of the power in them vested, without malice or any intent to injure

the plaintiff, removed him from the office of valuator and dismissed him from the same. 1889.

GALLAGHER

v.  
THE MUNICIPALITY OF  
WESTMORLAND.

11th. To the second count: That after the plaintiff had been appointed to the office of valuator, and before the 21st day of January, 1886, he became and was disqualified from holding the said office, and by reason thereof, and for that cause, the County Council of the Municipality, the above named defendants, without malice or any intent to injure the plaintiff, removed him from the said office, and dismissed him from the same.

12th. To the second count: That the plaintiff held the office of valuator only during the pleasure of the County Council of the defendants, and they, on the 21st day of January, 1886, signified their pleasure that he should no longer hold the said office, and without malice or any intent to injure him, then and there removed him from the said office.

13th. To the second count: That the plaintiff was appointed a valuator by the County Council of the defendants, and was, therefore, liable to be removed from the said office by the said Council on good cause shown; and that in January, 1886, it was charged against the plaintiff that he ought not to be permitted to continue to hold the said office, for the cause that he was not then a ratepayer on real or personal property in the said County of Westmorland, and that he had not paid his taxes for the year previous to the said month of January; whereupon the said Council, as by law they were authorized to do, proceeded to investigate the said charge, and did investigate, hear and determine the same, and adjudicated that the plaintiff should, for the cause aforesaid, be removed from the said office, and they accordingly did remove him from the same; and that in taking such proceedings for the investigation of the said charge, and for the said plaintiff's removal, and in hearing, determining and adjudicating upon the same, the Council acted judicially, and to the best of their judgment, and without malice or any intent to injure the plaintiff.

16th. To the third count: That before, and at the time mentioned, there were not three valutors for the County of Westmorland, but only two, by reason of the retirement and resignation of the third one; that the alleged services in the

1889.  
GALLAGHER  
v.  
THE MUNICIPALITY OF  
WESTMORLAND.

said count mentioned were done and performed by two valuat-  
tors, without the assent, knowledge, or concurrence of the  
third valuator, and when, in fact, there were but two valua-  
tors; and by reason thereof, and not otherwise, the assessors  
of taxes refused to fill up, complete and return the lists as  
alleged.

The plaintiff demurred to all the pleas except the 1st, 7th,  
8th, 14th and 15th, assigning as causes to the second plea :

1. The plea does not traverse, or confess and avoid the first  
count.

2. While the plea admits the due appointment of the plain-  
tiff as valuator, and his removal from office by the Council, it  
does not allege facts to show plaintiff's disqualification at the  
time the Council professed to remove, and made the orders re-  
moving the plaintiff from office, and appointing another in his  
stead on the 21st of January, 1886, or any justification for his  
removal, etc.

3. The facts stated in this plea show no grounds for re-  
moval of plaintiff from office, or justification of the orders in  
the first count of the declaration alleged to have been made.

To the third plea :

1. (Same as first objection to second plea.)

2. While it admits the due and legal appointment of the  
plaintiff to the office of valuator, yet it does not allege facts by  
which it is shewn how, or when or by what means or circum-  
stances he became and was disqualified from holding the  
office.

3. It admits his appointment at the time alleged in the  
declaration, and alleges disqualification arising before three  
years, which, by section 35 of chapter 100 Consol. Stat., is his  
term of office, and does not allege how, when or by what means  
he became disqualified, or the facts of the disqualification.

4. Plea should allege facts of disqualification and how in-  
vestigated and determined by the Council.



5. The plea merely states conclusion of law and not facts.

1889.

To the fourth plea :

GALLAGHER  
v.  
THE MUNICIPALITY OF  
WESTMOR-  
LAND.

1. (The same as first objection to second plea.)
2. The plea admits the due appointment to the office and holding by the plaintiff, and alleges no fact to justify removal.
3. The office by the statute is not held during the pleasure of the County Council, but for a definite term.

To the fifth plea :

1, 2 and 3 (substantially the same as the 1st, 2nd and 3rd objections to the second plea.)

4. Not being then (in January, 1886,) a ratepayer, does not disqualify him to hold the office, if he was qualified when appointed.

5. If there was any ground of removal, a Court must be held and examination take place after notice to the plaintiff, which is not alleged to have been done.

To the sixth plea :

1. (Same as first objection to second plea.)
2. It professes to answer the whole count, and does not answer the making of the order dismissing the plaintiff and appointing Kay, nor that the defendants wrongfully and illegally interfered with the plaintiff in his office, and prevented him from exercising the duties thereof.
3. If good at all, it should be confined to that part of the count which alleges the defendants dismissed the plaintiff.
4. The plea admits the facts of making the order displacing and removing the plaintiff, and yet states they did not dismiss thereby, arguing that because their orders of dismissal are illegal their making, etc., is not actionable. They are estopped from setting up any such defence as a bar, whatever the effect may be as to damages.

To the ninth plea the objections were substantially the same as those to the sixth plea.

1889.  
 GALLAGHER  
 v.  
 THE MUNICIPALITY OF  
 WESTMORLAND.

The objections to the 10th, 11th, 12th and 13th pleas, were the same as those to the 2nd, 3rd, 4th and 5th pleas.

To the sixteenth plea :

1. (Same as first objection to second plea.)
2. The plea admits the defendants did the acts complained of, but the facts alleged do not amount to a justification thereof.
3. Two valutors can act and make valuation.

June 18, 19, 1888. *Blair, A. G.*, argued for the defendants, and

*D. L. Hanington, Q. C.*, for the plaintiff.

The arguments of the counsel and the authorities cited are fully referred to in the judgments and need not be given here.

*Cur. adv. vult.*

The following judgments were now delivered :—

TUCK, J. This action is brought to recover damages for the dismissal of the plaintiff from the office of valuator in the Municipality of Westmorland. In the first count of the declaration it is charged that he was wrongfully, illegally and maliciously removed ; in the second count, that he was illegally and improperly removed ; and in the third count, that being a valuator with one Patrick Hebert, they were hindered and prevented from performing the duties of their office. The fourth is a count on contract : the breach is that the defendants maliciously dismissed the plaintiff from their service.

There is a demurrer to all the counts, and the plaintiff has demurred to the pleas.

The principal objection urged, is that no action for malice will lie against a corporation. So late as 1886 Lord Bramwell, giving his opinion in the House of Lords, says emphatically that no action lies. He must, therefore, have thought that at that time there had been no authoritative decision adverse to his view. He was not supported in this opinion by the other Lords, nor was there any expression by either of

them, that what Lord Bramwell had said was not the law. They said that it was unnecessary for the decision of the case. Without this strongly expressed opinion by a Judge of marked ability, I should have thought, after a careful review of the authorities, it was settled absolutely that in some cases an action for malicious prosecution would lie against a corporation. Only a few years before, the late Mr. Benjamin, a learned lawyer, arguing before the Privy Council, abandoned the point, which had been taken in the Court below, that a bank being a corporation could not, in any case, be liable to an action for malicious prosecution. The Chief Justice of the lower Court, relying upon the judgment of Baron Alderson in *Stevens v. Midland Counties Railway and Lander*, held the law to be so, on the ground that malice being a state of mind, cannot be attributed to a corporation, which has no mind. Mr. Benjamin, for the appellant, acknowledged that after recent decisions he could not support this broad proposition, and this met with the approval of Sir Montague Smith, who delivered the judgment of the Court.

Many of the cases cited at the bar were actions against railway or other companies, for trespasses which they had authorized their servants to commit, where the plaintiffs had been arrested and prosecuted for some alleged offence. In several of the actions, the question for the opinion of the Court was, whether or not the officer or agent had acted within the scope of his authority. Such were *Eastern Counties Railway Company*, and *Richardson v. Brown* (1), and *Roe v. Birkenhead, etc., Railway Company* (2). In each of these cases the plaintiff, who had been arrested at a station for refusal to pay the fare demanded, brought an action for false imprisonment, and the question arose as to the authority of the officers at the station to make the arrest. *Goff v. Great Northern Ry. Co.* (3), *Edwards v. London & Northwestern Ry. Co.* (4), *Poulton v. London and South Western Ry. Co.* (5), and *Allen v. London & South Western Ry. Co.* (6), are cases of a like character. In all of them the question involved was the liability of the master for the act of the servant. The right to

1889.

GALLAGHER  
v.  
THE MUNICIPALITY OF  
WESTMOR-  
LAND.  
—  
Tuck, J.  
—

(1) 6 Exch. 314.  
(2) 7 Exch. 36.  
(3) 3 E. & E. 672.

(4) L. R. 5 C. P. 445.  
(5) L. R. 2 Q. B. 534.  
(6) L. R. 6 Q. B. 65.

1889.  
GALLAGHER  
v.  
THE MUNICIPALITY OF  
WESTMORLAND.  
Tuck, J.

bring such an action was never questioned. But Lord Bramwell in *Abrath v. North Eastern Ry. Co.* (1), denies that this class of cases proves that actions which did not formerly exist are now allowed against corporations. He says: "It is certain that a corporation may order a thing to be done which is a trespass, because there the act of those who act for the corporation is not *ultra vires*. For instance, take the case of false imprisonment. A railway company gives somebody power to take up persons, who it believes are doing some wrong to the company. If a person is so authorized, that is an authority which may be unreasonably exercised. You cannot give an authority maliciously to prosecute, but you may give an authority to take up persons who are cheating a railway company. If that person to whom authority is given makes a mistake and takes up a person who is not cheating, it may in such a case be said properly to be the act of the company and they are properly liable. But in that case, there is neither malice nor motive in question. So also they may be liable for the publication of a libel. That unfortunate word 'malice' has got into cases of action for libel. We all know that a man may be the publisher of a libel without a particle of malice or improper motive. Therefore the case is not the same as where actual and real malice is necessary." Thus does Lord Bramwell endeavor to distinguish between the cases above cited, and those where malice in fact is imputed to the corporation. In the latter, he affirms, there is no binding authority for saying the action lies. After this judgment had been given, Lord Fitzgerald said: "I do not intend to make any observation upon the grave question on which my noble and learned friend (Lord Bramwell) has expressed his opinion so forcibly, as to whether this action lies against a corporation. That question is not now properly before us. We have had no argument upon it, and in the view which your Lordships have taken, it is unnecessary for the decision of the case. I have no doubt that the weighty observations of my noble and learned friend will be instructive in future, and will always carry with them that force before any tribunal which they eminently deserve." And Earl Selborne said: "The import-

ance of that question would certainly have led me, before I could arrive satisfactorily at an opinion of my own upon it, to desire to hear it argued. It has not been argued at your Lordship's bar. It was not, as far as I can see, a ground of decision in the Court below. What has been said by my noble and learned friend, I am sure, will have the weight due to all opinions of his whenever it comes to be solemnly examined."

That case was tried before Cave, J., when a verdict was entered for the defendant. The Queen's Bench Division (1) ordered a new trial, and on appeal the Lords Justices restored the judgment of Cave, J. No point was made in the Court below as to the right to bring the action against a Corporation.

Whatever may be the state of the law as to the liability of railway, banking and other corporations of a like character in such actions, I have not been able to find any authority which holds that an action is maintainable against municipal corporations, where malice is charged as the substantial ground. In fact, all the decisions to which reference has been made have been given since the growth and expansion of trading companies, and are applicable alone to that kind of corporations. It was for a long time denied that a municipal corporation (as distinguished from a corporation organized for private gain) was liable for the injury to an individual arising from negligence in the construction of a work authorized by it. That it is liable for such injury has been settled by numerous authorities in England, the United States and this country. But the English Courts hold, and the same doctrine is held in this Province, that a county, town or parish, being liable at common law to indictment only, and not to action for neglect to repair a highway, therefore, when the duty to repair, which before rested upon the county, town or parish, is transferred by statute to a public officer, or to a municipal corporation, or a board incorporated for the purpose, such corporation is no more liable to private action than the county, town or parish previously was, unless the statute transferring the duty clearly manifests an intention in the legislature to impose the additional liability. See *McKinnon v. Penson* (2); *Young v. Davis* (3); *Southampton and Itchin Bridge Co. v. Southampton*

1889.

GALLAGHER  
v.  
THE MUNICIPALITY OF  
WESTMORLAND.  
Tuck, J.

(1) 11 Q. D. B. 79 and 440.

(2) 9 Exch. 600.

(3) 7 H. &amp; N. 760; 2 H. &amp; C. 197.

1889. *Board of Health* (1); *Parsons v. St. Mathew's Vestry* (2);  
 GALLAGHER *Wilson v. Mayor of Halifax* (3); and *Gibson v. Mayor, etc., of*  
 THE MUNICIPALITY OF *Preston* (4). I have referred to these cases to show the distinction which has been made between a county corporation and other corporations. A statute creating a municipal corporation is imperative and binding, without any consent on the part of the inhabitants of the district incorporated, and in this differs from a private or voluntary corporation. Hence the distinction which has been made as to the nature and extent of liability of the two kinds of corporations. See cap. 98, secs. 1 and 2, Consol. Statutes, as to the general powers of joint stock companies, and cap. 99, secs. 1 and 2, as to Municipalities.

Tuck, J.

In *Green v. The London General Omnibus Co.* (5), the subject of malice in a corporation is discussed. There, Giffard, the present Lord Chancellor, I presume, arguing for the defendants, says: "The gist of the action is the malicious intention; and a corporation cannot, as such, be actuated by malice. A corporation, according to Lord Coke — *Sutton's Hospital Case* (6) — cannot commit treason, nor be outlawed, nor excommunicate, for they have no souls; neither can they appear in person, but by attorney. A corporation aggregate of many cannot do fealty, for an invisible body can neither be in person, nor swear (7); and the *Lord Berkley's Case* (8): It is not subject to imbecilities, death of the natural body, and divers other cases."

This was the old rule of law, which has of course been modified by recent decisions on the subject. F. Edwards, for the plaintiff, contended that "The old doctrine as to corporations is no longer tenable. In the time of Lord Coke, there were only three different kinds of corporations — municipal corporations, ecclesiastical or spiritual corporations, and eleemosynary or charitable corporations. The exigencies of modern times, however, have called into existence a new description of corporation for trading purposes; and to these the old law is altogether inapplicable; for acts done by them in furtherance of the pur-

(1) 8 E. & B. 801.  
 (2) L. R. 3 C. P. 56.  
 (3) L. R. 3 Exch. 114.  
 (4) L. R. 5 Q. B. 218

(5) 7 C. B. N. S. 288.  
 (6) 10 Co. Rep. 32 b.  
 (7) Plowd. Comm. 213.  
 (8) Plowd. Comm. 245.

poses for which they are created, they are clearly liable, whether for a breach of contract or a tort. It has been expressly decided in very many modern cases that a corporation aggregate can be guilty of malice." This was Mr. Edwards' view of the law in 1859. If the old law has been modified as to trading corporations, there is no decided case which alters the common law in respect of the different kinds of corporations which existed in the time of Lord Coke. It is not expressly decided in this case of *Green v. Omnibus Co.* that the defendants were liable on the ground of malice, but rather because they had been guilty of a wrongful act. In the course of his judgment, Erle, C. J., says: "We may add that we dwell less upon the grounds which have been urged by Mr. Giffard against the maintenance of the action, by reason of the extreme mischief and inconvenience which would follow from our holding that these companies incorporated for the purpose of carrying on trade were exempt from liability for intentional acts of wrong." I think a mischief almost as great would follow if we were to hold that, in a case like this one, a municipal corporation was liable for a malicious dismissal.

It is claimed also that the defendants are not liable, because in the dismissal of the plaintiff the Council acted judicially. It is not disputed that the Municipal Council, as was the old Quarter Sessions of the Peace, is a Court. I think if the defendants were otherwise liable for a malicious dismissal of the plaintiff by the Council, the fact that it was acting judicially, would not protect them. The case is much the same as that of a Justice of the Peace, who, although acting judicially, would be liable to an action of trespass, if with knowledge he acted without jurisdiction. On the other hand, even if what he did, was done without jurisdiction, he would be relieved of liability if he acted without knowledge or the means of knowledge of which he ought to have availed himself, of that which constituted the defect of jurisdiction. So here, apart from the general question as to their liability above discussed, the defendants are not liable, if the Council, in dismissing the plaintiff, acted *bona fide*, and in the full belief that they had the right to displace him, although their action was unlawful and improper. That they believed they were justified in re-

1899.

GALLAGHER  
v.  
THE MUNICIPALITY OF  
WESTMORLAND.  
Tuck, J.

1889.  
 GALLAGHER  
 v.  
 THE MUNICI-  
 PALITY OF  
 WESTMOR-  
 LAND.  
 Tuck, J.  
 —

moving the plaintiff, is, I think, shown by the facts set forth in the first count of the declaration. And the same facts, to my mind, show an absence of malice. Malice, in a legal sense, has been defined to mean a wrongful act done intentionally, without just cause or excuse. Now it appears from the first count of the declaration, that on the 19th January, 1886, the Council before passing a resolution to dismiss the plaintiff, appointed a committee to look into the matter of his appointment as a valuator in the preceding January. This committee reported that Mr. Gallagher had refused to resign his office of valuator, whereupon the same committee was ordered to retain counsel in the Gallagher matter, and report. On the same day the committee reported that they had consulted the Hon. D. L. Hanington (counsel for the plaintiff in the present case), who was of opinion that the Council had no power to displace Mr. Gallagher, and that they then consulted H. R. Emmerson, Esquire, who gave a contrary opinion to that of Mr. Hanington. The reasons for both opinions are set out. Then the Council, accepting, apparently, the opinion of Mr. Emmerson as good law, passed a resolution removing the plaintiff from the position of valuator, reciting therein that he was disqualified to hold the appointment. This action seems to have been carefully, reasonably and deliberately taken, and according to the definition of the word given above, without malice. But, suppose I am wrong in this view, and the councillors who voted for the resolution, did so maliciously, then, if there is any liability at all, they are liable and not the Municipality.

There can be no doubt that the second count is bad, for malice is not charged in it, and apart from malice, there is no cause of action. In *Tozer v. Child* (1), it is held that if a returning officer, without malice or any improper motive, but exercising his judgment honestly, refuses to receive the vote of a person entitled to vote at an election, no action will lie against him at the suit of such person. See also *Harman v. Tappenden* (2). When there is merely an error of judgment, an action will not lie. If there was no malice or improper conduct on the part of the councillors who voted for the

(1) 7 E. & B. 377.

(2) 1 East 555.



resolutions, it would be an outrage to subject them, or the Municipality, to an action.

Then as to the third count, I think that two valuator had no power to act; and if the assessors were instructed by the Council not to fill up or complete forms and schedules on the authority of notices received from two valuator only, this of itself does not constitute a cause of action. Sec. 35, cap. 100, Consol. Stat., requires that there shall be three county valuator in each county, to be appointed by the Council, no two of whom shall be resident in the same parish, city or town, and one of whom shall be named Chairman, and they shall be sworn to the faithful discharge of their duties before any Justice of the Peace. A board, to be full, must have three valuator; and there is no provision in the statute that two valuator shall have the power of three. For by sec. 36 the valuator shall constitute a board, to be called the "Board of Valuator," and they shall constitute a Court for the purpose of this chapter, and shall severally have power to administer an oath. How then could two valuator form a board and constitute a court, with power to administer oaths and perform the other duties named in the different sections, when the Act requires there shall be three? It appears clear they could not. No valuation was made, and no services were rendered by the plaintiff which would entitle him to make a claim on the County Council for compensation under sec. 104, cap. 100; and it is not alleged that any application has ever been made for compensation to the Council, or that compensation has been allowed or refused. Whatever compensation the plaintiff is entitled to receive, is under sec. 104; and the defendant are not liable in this action, even if the Council or Warden did wrongfully and unlawfully instruct the assessors not to fill up the schedules and return the lists to the two valuator.

I think the plaintiff cannot recover in an action on contract. If he ever entered the service of the defendant as a valuator, he did so under the statute, which provides for the appointment of valuator, and he is entitled to be paid only in accordance with the terms of the statute. The Council of the Municipality had no authority to make such a contract as is set forth in the

1889.

GALLAGHER  
v.  
THE MUNICIPALITY OF  
WESTMORELAND.  
Tuck, J.

1889.  
GALLAGHER  
v.  
THE MUNICI-  
PALITY OF  
WESTMOR-  
LAND.

Tuck, J.

fourth count of the declaration. It is not like a railway or banking corporation. It can only deal with the public money in the manner prescribed by law; having no power to borrow or lend money unless the power is conferred by the Legislature.

There is no provision in the Act relating to Municipalities, nor the one of rates and taxes, to warrant the Council in making a contract with the plaintiff for services, such as he is said to have rendered. Section 104 of cap. 100, provides for the compensation of officers of municipal corporations, and points out how the money required for this purpose shall be collected and paid. It is said there is an implied contract, on which the defendants are liable. But "there is no such implied obligation on the part of municipal corporations, and no such relation between them and officers which they are required by law to elect, as will oblige them to make compensation to such officers, unless the right to it is expressly given by law or ordinance or by contract. Officers of a municipal corporation are deemed to have accepted their office with knowledge of, and with reference to, the provisions of the charter or incorporating statute relating to the services which they may be called upon to render, and the compensation provided therefor. Aside from these, or some proper by-law, there is no implied assumpsit on the part of the corporation with respect to the services of its officers." Dillon on Corporations, sec. 169.

Then it is alleged in this count that the defendants illegally and maliciously dismissed the plaintiff, long before the expiration of the three years for which his services had been engaged. I repeat what I have already said as to the other counts, that the Municipality of Westmorland is not liable for a malicious discharge by the Council. If there is any liability for malice, it must be that of the officers, and not of the corporation.

This action seems to have been an experiment, and one, which I think ought not to succeed.

Being of opinion that all the counts of the declaration are bad, it is not necessary that I should consider the demurrer to pleas.

KING, J. The first count of the declaration alleges that the plaintiff was duly appointed by the County Council, as one of the county valuator on 24th January, 1885, for the period of three years; that he accepted the office; that in January, 1886, the County Council illegally and improperly passed certain resolutions in relation to him and to his office, and resolved that he be removed from the position of valuator on the ground of his having ceased to hold the ratepaying qualification necessary to his original appointment, and appointed another person to be a valuator in his place for the unexpired portion of his term; it also alleges that the defendants wrongfully, illegally and maliciously and with intent to deprive him of his first rights, fees, dues and emoluments, and to prevent him from discharging the duties and labors of the office of valuator dismissed, displaced and removed him from his office and appointed or attempted to appoint another in his place; and wrongfully and illegally interfered with the plaintiff in his said office, and prevented him from exercising the duties thereof as he lawfully had a right to do, whereby, etc.

1889.

GALLAGHER  
v.  
THE MUNICIPALITY OF  
WESTMOR-  
LAND.

The 2nd count alleges that defendants wrongfully and illegally interfered with and prevented plaintiff from proceeding or making or taking any part in the valuation and acting as such valuator, and illegally and wrongfully discharged and dismissed plaintiff from his said office, whereby plaintiff not only lost and was deprived of all the fees and emoluments of his said office, but was also put to large expenses and costs in being reinstated to his office as valuator, etc.

The 3rd count alleges that plaintiff and one Hebert, another valuator, had requested the assessors to fill up and make certain returns to plaintiff and Hebert, and that it was the duty of the assessors to do so, yet the defendants well knowing the premises, wrongfully, wilfully and unlawfully instructed the assessors not to make, fill up or complete the forms or schedules or return the same to the plaintiff and Hebert, and in consequence of which the assessors would not or did not do as requested by plaintiff and Herbert, whereby plaintiff and Herbert were hindered and prevented from discharging their duties, etc.

The 4th count is in contract and alleges that in consideration

1889.  
GALLAGHER  
v.  
THE MUNICIPALITY OF  
WESTMOR-  
LAND.  
King, J.

that plaintiff would enter the service of defendants; the defendants promised to retain him in their service as valuator for three years, and alleged breach.

First, as to the 4th count. It alleges a breach of contract in the wrongful amotion of plaintiff from his office of valuator; and as the only office of valuator is that created by statute, it is obvious that unless the exercise of the statutory duty creates a contract, there can be no contract at all. The law imposes upon the defendants a public duty to appoint valutors, and there being this public duty to appoint some one, the selection of a particular person to fill the office is not entirely a free act to be done or left undone as the defendants may think fit, as is the case where a contract is entered into. The performance of the statutory duty of selecting a fit and proper person to fill a public office in which defendants have no peculiar interest, is the exercise of a public trust enforceable by mandamus, and not the voluntary creation of contractual relations. On the one hand the municipality has no remedy as for breach of contract against a valuator declining to discharge his duties, and on the other the valuator has no remedy as for breach of contract against the municipality for an illegal amotion. The fact that, after service performed and all conditions observed, an action of debt may lie for compensation provided by statute is a very different thing and not at all inconsistent with the absence of contract in the act of appointment.

Next, as to the 3rd count. The Act requires the appointment of three valutors. These constitute a board of valutors and a court for the purposes of the chapter. By cap. 118, sec. 1 (3), authority to three or more persons jointly empowered to act enables a majority of them to act; but until the board is constituted by the appointment of the three valutors, the provision as to the authority of the majority to act does not come into exercise. The third count, therefore, fails to show that the plaintiff and Herbert had the right to require the assessors to do that which the defendants are charged with having interfered to prevent them doing.

Next, as to the 2nd count. I think that this is sufficient. It was objected by the *Attorney-General* that the action would not lie in the absence of malice, as the Court had already

decided that the County Council in its attempted removal of Gallagher was exercising judicial functions. But one of the wrongful acts charged in this count of the declaration is the wrongful and illegal interference with the plaintiff in the execution of his office. The averment is that "the said defendants wrongfully and illegally interfered with and prevented the plaintiff from proceeding with or making or taking any part in the valuation and acting as such valuator." The count does indeed go on to charge further that they "illegally and unlawfully dismissed the plaintiff from his said office," and probably this imports an act done in the exercise of judicial functions; but, however this may be, the objection of the learned *Attorney-General* does not lie against the first mentioned charge of wrong-doing.

1889.

GALLAGHER  
v.  
THE MUNICIPALITY OF  
WESTMORLAND.  
—  
King, J.  
—

It was contended that the councillors would alone be liable in their private capacity for any such act of wrong doing, but *Harman v. Tappenden* (1), shows that if liable at all in their private capacity for acts done by them in their corporate capacity, it could only be upon allegation and proof of malice.

Then as to the 1st count: This alleges that defendants illegally and maliciously, and with intent to injure plaintiff, etc., dismissed and removed him from his office, and appointed, or attempted to appoint another; and also alleges that they wrongfully and illegally interfered with the plaintiff in his said office, and prevented him from exercising the duties thereof. As to this latter charge, it seems to me good upon the grounds referred to in treating of the second count.

As to the first charge, viz., of maliciously removing plaintiff from his office, the allegation of malice is necessary to the statement of the actionable wrong, as the effect of the decision in the former proceedings in this matter is to make the act of amotion by the Council a judicial act, and this to be actionable requires to have been done maliciously. See *Tozer v. Child* (2); *Fray v. Blackburn* (3); *Calder v. Halket* (4).

But the contention on the part of the defendants is that malice cannot be predicated of the acts of a corporation, or, at all events, of the acts of a corporation such as a county municipi-

(1) 1 East 554.

(2) 26 L. J. Q. B. 151.

(3) 3 B. &amp; S. 576.

(4) 3 Moo. P. C. 22.

1889.  
GALLAGHER  
v.  
THE MUNICIPALITY OF  
WESTMORELAND.  
Kling, J.

pality. In *Abrath v. North Eastern Ry. Co.* (1), Lord Bramwell strongly denied that any corporation could act maliciously; but the rest of their Lordships did not think that the determination of this question was involved in the decision of the case, and refrained from expressing an opinion upon it. In *Bank of New South Wales v. Owston* (2), which was a case of malicious prosecution brought by the respondent against the bank, the judicial committee treat the point as settled the other way. Mr. Benjamin, for the appellant, is reported as saying, "the point that an action will not lie against a corporation for malicious prosecution is given up," and the Judicial Committee, referring to this point, say at p. 282: "The learned counsel for the appellant acknowledged that after recent decisions he could not support this proposition."

In *Mackay v. Commercial Bank of New Brunswick* (3), it was held that an action of deceit may be maintained against a trading company, whether incorporated or not incorporated, in respect of the fraud of its agent, and that for the purposes of pleading, the fraud of the agent may be treated as that of the principal. And if a corporation is capable of deceit, it is capable of malice. See also *Ranger v. Great Western Ry. Co.* (4).

*Edwards v. Midland Ry. Co.* (5) was an action for malicious prosecution. Fry, J., declined to follow the opinion of Alderson, B., in *Stevens v. Midland Counties Ry. Co.* (6), to the effect that the defendant being a corporation could not be actuated by malice, and held, in conformity with what he conceived to be the later decisions, that the action would lie. In the judgment of Fry, J., the cases are so well summarized that I beg to repeat his words:

"In *Rex v. City of London*, which is cited in a note to *Whitfield v. South Eastern Ry. Co.* (7), it was held on demurrer that an action would lie against the corporation of the city of London for maliciously publishing a libel, and though that decision is not of the greatest weight, being affected no doubt by political as well as legal considerations, still it was assented to by Chief Justice Saunders, an able and experienced Judge. In

(1) 11 App. Cas. 250.  
(2) 4 App. Cas. 270.  
(3) L. R. 5 P. C. 394.  
(4) 5 H. L. Cas. 72.

(5) 6 Q. B. D. 237.  
(6) 10 Exch. 352.  
(7) 2 B. & E. 131.

*Yarborough v. Bank of England* (1), Lord Ellenborough referred to an earlier case of *Argent v. Dean and Chapter of St. Pauls* (2), and said that the instances of actions against corporations for false returns to writs of mandamus must be numberless. Again, in *Whitfield v. South Eastern Ry. Co.* (3), Lord Campbell says that the 'ground on which it is contended that an action for a libel cannot possibly be maintained against a corporation aggregate fails,' and 'considering that an action of tort and trespass will lie against a corporation aggregate, and that an indictment may be preferred against a corporation aggregate both for commission and omission, to be followed up by fine, though not by imprisonment, there may be great difficulty in saying that, under certain circumstances, express malice may not be imputed to and proved against a corporation. In *Green v. London General Omnibus Co.* (4), it was held that a corporation aggregate may be liable to an action for intentional acts of misfeasance by its servants, provided they are sufficiently connected with the scope and object of its incorporation. There Chief Justice Erle says: 'The ground of the demurrer is, that the declaration charges a wilful and intentional wrong, and that the defendants being a corporation cannot be guilty of such a wrong, and therefore the action will not lie. The doctrine relied on that a corporation having no soul cannot be actuated by a malicious intention, is more quaint than substantial.' In other words, the *ratio decidendi* of Baron Alderson was in this case disregarded, and as his decision has not been followed in English Courts, I am at liberty to decide in conformity with the later decisions, and I hold, therefore, that the action will lie in this case."

1889.  
GALLAGHER  
v.  
THE MUNICIPALITY OF  
WESTMORLAND.  
King, J.

If you can affirm of a corporation, *e. g.*, the defendant corporation, that it acts *bona fide*, as, for example, where a question of right to notice of action is concerned, why may it not act *mala fide*? If it may be liable for breach of duty or negligence or for trespass which may involve the element of wilfulness, why may not knowledge and intention be imputed to it? "Malice, in common acceptation," says Bayley, J., in *Bromage v. Prosser* (5) "means ill will against a person, but

(1) 16 East 6.  
(2) 16 East 7, note a.  
(3) 5 E. R. & E. 121.

(4) 7 C. B. N. S. 290.  
(5) 4 B. & C. 247.

1889. in its legal sense it means a wrongful act, done intentionally,  
 GALLAGHER without just cause or excuse." Now, a corporation may do a  
 v.  
 THE MUNICIPALITY OF wrongful act, and may do it without just cause or excuse, and  
 PALITY OF it may do it intentionally, for all the acts of a corporation are  
 WESTMOR- not to be referred to chance or inadvertence, or duress or want  
 LAND. of purpose; and if it can intentionally do a right act, it can  
 King, J. intentionally do a wrongful act, the exercise of the intention  
 or corporate reason and will being as easy in one case as the  
 other, and the difference being only in the character of the  
 thing intended and done as affecting the rights of others.

I conclude, therefore, upon authority and principle, that a corporation may be actuated by malice, in the legal sense of the term.

It is, however, argued that there is a distinction in this respect between trading corporations and municipal corporations, or at least between trading corporations and such municipal corporations as are voluntarily organized, on the one hand, and, on the other hand, such corporations as the Municipality of Westmorland which, it is contended, is simply an agency of government. This latter distinction is recognized for many purposes in American law. See *Barnes v. District of Columbia* (1). In Dillon on Municipal Corporations, sec. 764, it is said that "the Courts have been much perplexed respecting the principle upon which to rest the distinction so generally taken, by which what is termed a *quasi* corporation, though possessing full corporate capacity and a corporate purse, is not impliedly liable for acts of misfeasance or neglect of public duty on the part of its officers and agents, while for a similar wrong there is such a liability resting on municipal or chartered corporations. But the distinction, whatever its ground, is well established; and the latter class of corporations is considered to be impliedly liable for acts done in what is termed their private or corporate character, and from which they derive some special or immediate advantage or emolument, but not as to those done in their public capacity as governing agencies in the discharge of duties imposed for the public or general (not corporate) benefit." Then, in sec. 785, it is said that "counties and townships, though incorporated, are

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(1) 1 Otto 540.



regarded as *quasi* corporations and agencies of the state, and not liable to be sued civilly for damages caused by the neglect to perform statutory duty to repair highways, unless the action is specially given by statute."

It would not be well to become involved in the "perplexity" which, according to this high authority, is felt by the United States Courts in endeavoring to find a satisfactory principle upon which to rest the distinction referred to. When once we have reached the conclusion that there is nothing in the nature of a corporation (as it exists in the contemplation of English law) that prevents it from being capable of doing a wrongful act, intentionally, and without just cause or excuse, it seems to me to become difficult for any corporation (whatever its objects) to set up, as a matter of law, its entire legal incapacity to act maliciously. But as the wrongful act must be one which is done within the general scope of the authority of its officers or agents by whom the wrongful act is done, it may very well be that the limits or sphere within which one corporation or kind of corporation may do a wrongful act, intentionally, and without just cause or excuse, may be much more restricted than the limits or sphere within which another corporation or kind of corporation may do a like act. The implied powers of officers and agents may be much more limited in one case than in the other. But these considerations relate more to the matters of proof than to matters of pleading, so far at least as regards the points of demurrer raised upon these pleadings. I know nothing in law which requires one to say that any class of corporation is wholly incapacitated from doing a wrongful act, intentionally, without just cause or excuse. Then, as to the scope of the defendants' powers. They and they alone have power to appoint, and power for cause to remove valuers. Their agents, acting in reference to such matter, are therefore acting within the general scope of their authority.

The result, therefore, in my opinion, is that the first and second counts are good, and the third and fourth counts bad.

The sufficiency of the pleas demurred to will be determined by the application of the principles above stated.

1889.  
GALLAGHER  
v.  
THE MUNICIPALITY OF  
WESTMORELAND.  
King, J.

1889. **GALLAGHER** **PALMER, J.** This is a demurrer to the declaration, also to several pleas, and the first question in the case is, whether an action can be maintained against the Municipality for the action of the Council without malice? Second, if malice is necessary, can the defendants, in their corporate body, be guilty of malice? Third, is the Municipality liable for the the action of the County Council? Fourth, do the pleadings show a good cause of dismissal? Fifth, if the Council did the act judicially and with malice, and the plaintiff was thereby dismissed from his office, and thus injured, would it be a good cause of action?

**v.**  
**THE MUNICIPALITY OF**  
**WESTMOR-**  
**LAND.**

The question whether a corporation is liable for a malicious act without reasonable cause or excuse, or indeed for any wrongful act, has been a difficult one to solve from the foundation, for the principles involved are difficult to apply. The extreme argument is, that a corporation having only definite authority to do acts that are legal, have no power to confer on an agent power to do anything wrong; and, therefore, when their directors, officers or other agents profess to authorize or direct a wrong, they are acting *ultra vires*, and such act is their individual act, and not the act of the corporation. If the law had allowed this principle to be carried out to this extremity, the result would have been that all corporations, like sovereigns, could never do wrong, and therefore this was not allowed; and the more wholesome rule, that although corporations could only act by agents duly authorized, yet such corporations were answerable for the manner the agent they did appoint did the work of the corporation they had appointed him to do, not only for what he did in pursuance of the authority and directions given, but also for what he did in direct opposition to such directions, so long as it was apparently within the business that he was authorized to do, and that he was apparently carrying on for them. This is a principle that the law applies to all private persons who are principals, and who employ agents to do work that the principal professes to do, as well as to corporations. Thus, if any person employs another to do his business, what he does in the business that he has apparent authority to do, although a wrong, the principal is liable for, even if he forbids it being

done in the manner it was done. That this principle applies to a corporation as well as to an individual, is shown by the address of Lord Cottenham to the House of Lords, in *Ranger v. Great Western Railway Co.* (1).

Having got this far, I cannot see why the same principle ought not to apply if the agent commits a fraud in the course of his employment, and injury is occasioned by it; and it appears that the case of *Walker v. South Eastern Railway Co.* (2), proceeds on that ground. But it is contended that even if private corporations are so liable, corporations of a public nature are not; and no doubt many of the United States cases are decided upon that principle. How much of that law has been introduced into the law of this Province by *Black v. The Municipality of Saint John* (3), I am not able to say; but that principle has no place in England since the decision in the case of *The Mersey Docks Co. v. Gibbs* (4), and *Coe v. Wise* (5), which establish two propositions: first, that corporations or commissioners appointed for carrying out and taking charge of public works, though acting gratuitously, are liable for negligence or breach of duty to whoever may directly sustain any injury therefrom; secondly, if such persons, by their servants, do any wrong by which they do damage to another, they are liable.

The first count tried by these rules of law, and admitting all that is alleged in it to be true, that this corporation has by its agents, that is, the persons whom it has authorized to do the work of dismissing the valuers, maliciously and without reasonable cause dismissed the plaintiff, by which he was damaged, this appears to me was a wrong to the plaintiff, whoever did it, and, therefore, this corporation is liable, if the persons who formed the Council are the persons that the corporation authorized to dismiss at all. It appears to me that the wrong to the plaintiff is his dismissal; and in order to be such dismissal, the Council must have the power to do so for some cause, and their act in doing it be judicial; and if the Council was not appointed to do such acts, and the Legislature had given them no power to dismiss for any cause, then the order

1889.

GALLAGHER  
v.  
THE MUNICIPALITY OF  
WESTMORLAND.  
Palmer, J.

(1) 5 H. L. Cas. 72.  
(2) L. R. 5 C. P. 640.  
(3) 23 N. B. Rep. 249.

(4) 11 H. L. Cas. 686.  
(5) L. R. 1 Q. B. 711.

1889.  
GALLAGHER  
v.  
THE MUNICIPALITY OF  
WESTMORLAND.  
Palmer, J.

of dismissal could be no injury to the plaintiff, for it cannot be valid under any circumstances.

I do not think that the second count shows any cause of action, for if what is meant by wrongfully discharging is that they, by a judicial act, dismissed him, then they are not liable unless they acted maliciously. If all that is meant is that they attempted to dismiss him, and made no order which was, apparently, valid, this would not injure him, as he would still be valuator, and his status not altered at all in law, and thus no legal injury.

As all that is stated in the third count is that the defendants did something they were not authorized to do, which is, in fact, a mere attempt by the members of the Council to do something which is clearly void, it is, I think, no ground for action.

As to the fourth count: the only reason that can be suggested why this count cannot be sustained, is that the defendants could not make the contract set out in it, for if they could make it, it is alleged that they did so, and that they committed breach of it, and this is a good cause of action.

The 99th cap. of the Consol. Stat., sec. 2, makes this Municipality a body politic and corporate, and section 5 authorizes the County Council to exercise all the powers of a body corporate, and the first section of cap. 98 makes all corporations capable of suing and being sued, and to make bye-laws not contrary to law to manage their affairs. If so, the having and paying of valutors is part of the business of this corporation, and they are compelled to pay for the work, and I can see nothing to prevent their making a contract with a man whom they wanted to have as valuator, to pay him his right, and if they do so, and if he did the whole or part of the work, they would be liable by every principle of law and justice.

As to the 2nd, 3rd, 4th and 5th pleas to the first count, as they do not traverse the malice as alleged, and the matters and causes they set up for dismissing, are not reasonable or valid, they afford no answer, and are bad. The 6th plea, which is a simple denial of the dismissal, is, I think, good.

As to the pleas to the second and third counts, I think we ought not to allow the demurrer on them all, not because I think

they would be any answer to a cause of action, if any there was set out in the counts to which they are pleaded, but because these counts themselves are not good; and as we are bound to give judgment upon the whole pleading, anything would be an answer to them, because they require none.

As to the main point in the case, whether a corporation is liable for the wrongful acts of its agents acting within the course of the business which they were appointed to do, and particularly where, as in this case, the agents who are acting wrongfully and maliciously are the persons who alone have the power to do every act which the corporation itself can do, and where all the corporators have a voice in appointing them, no doubt is a question of great importance; but I think the result of the authorities, as well as sound reason, makes them so liable. The point no doubt has been most ably argued by Baron Alderson, in *Stevens v. The Midland Railway Co.* (1), and by Lord Bramwell, in *Abrath v. North Eastern Railway Co.* (2), on the one side, and by Erle, C. J., in *Green v. London General Omnibus Co.* (3), and by Mr. Justice Fry in *Edwards v. Midland Railway Co.* (4). But this much may be said: the latter cases referred to were actual decisions upon the point, whereas the opinions of Baron Alderson and Lord Bramwell were mere minority opinions. The ground on which Baron Alderson proceeds is that a corporation has no soul or mind, and therefore cannot act maliciously or intentionally, because malice and intention implies mind. This doctrine Erle, C. J., says is more quaint than substantial. I, however, think it is a mistake, for in fact it is nothing more than a joint act of all the corporators, and in this respect it is just the same as if it was a partnership. A corporation is nothing more than allowing so many individuals to act together under a particular name and for a particular purpose, and the moment this is done, it in no way, in my opinion, differs from a mere partnership for the same purposes. Whatever would make all the members of a firm liable for the acts of the agent of the firm who was authorized to do acts within the scope and purpose of the partnership would make a corporation liable; and this

1889.

GALLAGHER  
v.  
THE MUNICIPALITY OF  
WESTMORLAND.

Palmer, J.  
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(1) 10 Exch. 252.  
(2) 11 App. Oas. 247.

(3) 7 C. B. N. S., 290.  
(4) 6 Q. B. D. 237.

1889.  
 GALLAGHER  
 v.  
 THE MUNICIPALITY OF  
 WESTMORELAND.  
 ———  
 Palmer, J.

appears to be the view of Lord Bramwell, for he says: "If the whole body of shareholders were to meet, and in so many words say, 'prosecute so and so, not because we believed him guilty, but because we thought it will be for our interest to do it,' no action would lie against the corporation." If this is so, how can the case of *Whitfield v. South Eastern Railway Co.* (1) be maintained, in which it was decided an action of libel could be maintained against a corporation? and in that case Lord Campbell said: "There may be danger in saying that under certain circumstances express malice may not be imputed to and proved against a corporation."

Again Lord Bramwell said: "But it is said that a variety of actions have been allowed against corporations which formerly did not exist. I deny it. It is certain that a corporation may order a thing to be done which is a trespass, because there the act of those who act for the corporation is not *ultra vires*. For instance, take the case of false imprisonment. A railway company gives somebody power to take up persons who, it believes, are doing some wrong to the company. If a person is so authorized, that is an authority which may be unreasonably exercised. You cannot give an authority maliciously to prosecute, but you may give an authority to take up persons who are cheating a railway company."

With all deference to so high an authority, I confess myself unable to see the distinction he attempts to make. A railway company cannot give power to any one to take up persons unless they are doing wrong to the company, but they can give authority to them to take up persons who are so doing. Just so here. This corporation could not give power to the County Council to maliciously dismiss the plaintiff; but they could and did give power to dismiss him for certain good causes, and in a certain reasonable and proper manner; and if they were so authorized, that is an authority which may be maliciously and unreasonably exercised.

Again Lord Bramwell says: "So they may be liable for the publication of a libel. That unfortunate word 'malice' has got into cases of actions for libel. We all know that a man may be the publisher of a libel without a particle of malice or

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(1) E. B. & E. 115.

improper motive. Therefore the case is not the same as where actual and real malice is necessary."

If this be so, this is directly against the express decision in the case where the corporation was adjudged liable for libel, and it appears to me surprising that his lordship should have overlooked that many actions of libel cannot be maintained without express malice. Would it not be a curious result of this law of corporations that where a newspaper was published by a number of individuals, not a corporation, that they should be liable for the publication that was *prima facie* privileged, because there was actual malice, and that a like newspaper published by a corporation would not be liable for the same libel. It appears to me to allow such a doctrine to be held for a single moment, would be destructive of the rights of the public, and remove from individuals the safeguards that the law has properly thrown around them.

In the case of *Philadelphia, Wilmington & Baltimore R. R. Co. v. Quigley* (1), Mr. Justice Campbell, in delivering the opinion of the Supreme Court of the United States, said: "The defendants contend that they are not liable to be sued in this action; that theirs is a railway corporation with defined and limited faculties and powers, and having only such incidental authority as is necessary to the full exercise of the faculties and powers granted by their charter; that being a mere legal entity, they are incapable of malice, and that malice is a necessary ingredient in a libel; that this action should have been instituted against the natural persons who were concerned in the publication of the libel. To support this argument, we should be required to concede that a corporate body could only act within the limits and according to the faculties determined by the Act of incorporation, and therefore that no crime or offence can be imputed to it. That although illegal acts might be committed for the benefit or within the service of the corporation, and to accomplish objects for which it was created by direction of their dominant body, that such acts, not being contemplated by the charter, must be referred to the rational and sensible agents who performed them, and the whole responsibility must be limited to those

1889.  
GALLAGHER  
v.  
THE MUNICIPALITY OF  
WESTMORELAND.  
Palmer, J.

1839. agents, and we should be forced, as a legitimate consequence, to conclude that no action *ex delicto*, or indictment will lie against a corporation for any misfeasance. But this conclusion would be entirely inconsistent with the legislation and jurisprudence of the States of the Union relative to these artificial persons. Legislation has encouraged their organization, as they concentrate and employ the intelligence, energy and capital of society, for the development of enterprises of public utility. There is scarcely an object of general interest for which some association has not been formed, and there are institutions whose members are found in every part of the Union, who contribute their efforts to the common object. To enable impersonal beings—mere legal entities, which exist only in contemplation of law—to perform corporal acts, or deal with personal agents, the principle of representation has been adopted as a part of their constitution. The powers of the corporation are placed in the hands of a governing body selected by the members, who manage its affairs, and who appoint the agents that exercise its faculties for the accomplishment of the object of its being. But these agents may infringe the rights of persons who are unconnected with the corporation, or who are brought into relations of business or intercourse with it. As a necessary correlative to the principle of the exercise of corporate powers and faculties by legal representatives, is the recognition of a corporate responsibility for the acts of those representatives. With much wariness, and after close and exact scrutiny into the nature of their constitution, have the judicial tribunals determined the legal relations which are established for the corporation by their governing body, and their agents, with the natural persons with whom they are brought into contact or collision. The result of the cases is, that for acts done by the agents of a corporation, either *in contractu* or *in delicto*, in the course of its business and of their employment, the corporation is responsible, as an individual is responsible under similar circumstances. At a very early period it was decided in Great Britain, as well as in the United States, that actions might be maintained against corporations for torts; and instances may be found in the judicial annals of both countries, of suits for

GALLAGHER  
v.  
THE MUNICIPALITY OF  
WESTMORELAND.  
Palmer, J.



torts arising from the acts of their agents, of nearly every variety."

I, therefore, think that the demurrer must be overruled as to the first and fourth counts of the declaration, and allowed as to the second and third; overruled as to 2nd, 3rd, 4th and 5th pleas to the 1st count, and also to all the pleas to the second and third counts, and allowed as to all the other pleas.

1889.  
GALLAGHER  
v.  
THE MUNICIPALITY OF  
WESTMORLAND.  
Palmer, J.

SIR JOHN C. ALLEN, C. J. The declaration in this case contains four counts. The defendants pleaded and demurred to each count, and the plaintiff demurred to most of the pleas.

The first count stated, in substance, that before and at the time of the appointment of the plaintiff as a valuator of the County of Westmorland, he was an inhabitant of, and a ratepayer upon real and personal estate in the said county, and that at the semi-annual meeting of the County Council of the Municipality of the county, held in January, 1885, he being in all respects qualified and eligible to be appointed a valuator of the said county, was so appointed by the said Municipal Council for three years then next ensuing; which appointment he thereupon accepted, and was then, and has ever since been willing to act as such valuator, and to discharge the duties of the office, had he been permitted to continue to do so. That the defendants and the County Council at the semi-annual meeting of the Council, held in January, 1886, illegally, wilfully and improperly passed an order and resolution relating to the plaintiff and to his said office, and declaring that he was disqualified from holding the office of valuator, and that another person should be appointed in his stead for the unexpired term. That on a subsequent day in the said month, the council wrongfully, illegally and maliciously, with intent to injure the plaintiff, and to deprive him of his just rights, fees and emoluments, dismissed him from his said office, and appointed one Early Kay valuator for the unexpired term in place of the plaintiff. It then alleged that the plaintiff had been obliged to pay out large sums of money in obtaining an order of this Court to set aside the resolution of the Council removing the plaintiff and appointing Kay in his place. The several resolutions of the Council appointing the plaintiff a valuator, and

1889. afterwards displacing him and appointing Kay in his place,  
GALLAGHER were set out *verbatim* in the count.

v.  
THE MUNICI- The grounds of demurrer to this count were as follows :

PALITY OF  
WESTMOR-  
LAND.

Allen, C. J.

1. That the action could not be sustained without proof of malice, and that the defendants were incapable of such malice as would sustain the action.

2. That if the members of the Council acted maliciously in removing the plaintiff from office, they might render themselves liable, but the defendants would not be liable.

3. That the defendants were not liable for the acts of the County Council.

4. That the resolutions and proceedings set forth in the declaration shewed good cause for the plaintiff's dismissal.

5. That the Council having power to appoint, had also power to dismiss the plaintiff without cause: that he held his office at the pleasure of the Council.

6. That the declaration did not state that the plaintiff was qualified as a ratepayer to hold the office of valuator at the time of his dismissal in January, 1886.

7. That in dismissing the plaintiff, the Council acted judicially in a matter within its jurisdiction and control, and the defendants were not therefore liable for error in law, or mistaken procedure.

8. That the resolutions set out in the declaration shewed absence of malice.

9. That if the Council had no power by law to dismiss the plaintiff, either without cause or for the cause assigned, they were acting beyond the authority delegated to them, and their act was *ultra vires*, and the defendants would not be liable.

As to the first objection: I think it was not necessary either to allege malice, or to prove it. It would be sufficient to prove that the dismissal of the plaintiff was illegal. *Green v. London General Omnibus Co.* (1). The cases which were cited to shew that an action could not be maintained against a corporation where malice was necessary to be proved, were actions for

slander and for malicious prosecution. This also answers the second objection.

1889.

GALLAGHER  
v.  
THE MUNICIPALITY OF  
WESTMOR-  
LAND.  
—  
Allen, C. J.

Third objection—Whether the defendants are liable for the acts of the County Council depends, I think, upon the question whether the act complained of was within the scope of their powers, which I will consider hereafter.

The fourth objection is disposed of by the case of *Ex parte Gallagher* (1) in which this Court decided that the Council had no power to dismiss the plaintiff from office for the cause which they alleged. That also disposes of the sixth objection.

The fifth objection is not sustainable. By the express words of the 35th section of cap. 100, Con. Statutes, the plaintiff held office for three years, and not at the pleasure of the Council, as alleged. The words of the section are, "the valuator shall continue in office for three years." The provision in chap. 118 of the Consolidated Statutes, that "authority to appoint, shall include authority at any time to displace," which is relied on by the defendants, is qualified by the preceding words of the section—"Unless otherwise expressly provided for, or such construction would be inconsistent with the manifest intention of the Legislature." To adopt the contention of the defendants' counsel that the County Council had authority at any time to dismiss the plaintiff, would be entirely inconsistent with the words of the 35th section.

Seventh—that in dismissing the plaintiff the Council were acting judicially. If the Council had no power by law to dismiss the plaintiff for the cause assigned, I do not think that the fact of their acting judicially would be any justification for them. The cases of *Calder v. Halket* (2), and *Taafe v. Downes* (3), where the defendants were held not liable for their judicial acts, were actions against Judges of Superior Courts. The case of *Kemp v. Neville* (4) decides that a judicial officer is not liable to be sued for an adjudication according to the best of his judgment upon a matter within his jurisdiction. In the present case, the dismissal of the plaintiff for the cause assigned in this count was not a matter within the jurisdiction of the Council. How their act will affect the defendants, I will consider presently.

(1) 26 N. B. Rep. 73.  
(2) 3 Moo. P. C. 28.

(3) 3 Moo. P. C. 26.  
(4) 10 C. B., N. S. 523.

1889.

GALLAGHER  
v.  
THE MUNICIPALITY OF  
WESTMOR-  
LAND.

Allen, C. J.

The ninth objection raises a very important question. The Court has decided in *Ex parte Gallagher*, that in dismissing the plaintiff the Council exceeded its authority; in fact, that its action was *ultra vires*; and I think, the effect of the authorities is that the defendants would not be liable for such an act of the Council. I therefore now propose to consider that question, which is the substantial one in the case.

No doubt there is a difference between the liability of trading companies, such as Canal, Dock and Railway Companies, of which the cases of *Parnaby v. Lancaster Canal Co.* (1), *Gibbs v. Mersey Docks Trustees* (2), and *Poulton v. London & S. W. Railway Co.* (3), are instances, and corporations created for mere municipal purposes in the management and government of the affairs of a town or county, where the corporate body acts gratuitously for the public. In the latter case, the corporation may not in general be liable to an action for damages to an individual.

In several of the cases referred to on the argument, the actions were brought for damages sustained by the plaintiffs in consequence of the neglect of the defendants to perform some duty imposed on them by statute, such as the repairing of a bridge or highway. The case of *Hill v. The City of Boston* (4) was one of that character. There, Gray, C. J., delivering the judgment of the Court, in an exhaustive review of all the principal cases on the subject—both English and American—said that it was well settled that the common law gave no such action. That corporations, created for their own benefit, stood on the same ground in this respect as individuals; but *quasi* corporations, created by the Legislature for purposes of public policy, were subject by the common law to an indictment for neglect of duties enjoined on them, but were not liable to an action for such neglect unless it was given by statute.

That principle was affirmed and acted on by this Court in *Dwyer v. Town of Portland* (5), where it was held that the defendants would be liable for an injury sustained in consequence of their misfeasance, but not for mere nonfeasance. The case of *Clarke v. Town of Portland* (6) depended upon a differ-

(1) 11 A. & E. 223.  
(2) L. R. 1 H. L. 93.

(3) L. R. 2 Q. B. 534.  
(4) 123 Mass. 344.

(5) 4 P. & F. 422.  
(6) 3 P. & F. 192.

ent principle, though practically it recognized the distinction between the liability for acts of misfeasance and nonfeasance. 1889.

GALLAGHER  
v.  
THE MUNICIPALITY OF  
WESTMORLAND.  
Allen, C. J.

The present action is not brought for the neglect of any duty imposed on the defendants by statute, but for the wrongful act of dismissing the plaintiff from the office to which he had been appointed. For such an act, I think it may be inferred that, in the opinion of Gray, C. J., in the case of *Hill v. The City of Boston* (*supra*), a quasi Corporation might be liable.

In Dillon on Municipal Corporations, sec. 966, it is said: "As respects Municipal corporations proper, whether specially chartered or voluntarily organizing under general Acts, it is, we think, universally considered, even in the absence of a statute giving the action, that they are liable for acts of misfeasance positively injurious to individuals, done by their authorized agents or officers in the course of the performance of corporate powers constitutionally conferred, or in the execution of corporate duties."

Again, in sec. 968, it is said: "The rule of law is a general one, that the superior or employer must answer civilly for the negligence or want of skill of his agent or servant in the course or line of his employment, by which another is injured. Municipal corporations, under the conditions herein stated, fall under the operation of this rule of law, and are liable accordingly to civil actions for damages when the requisite elements of liability co-exist. To create such a liability, it is fundamentally necessary that the act done which is injurious to others, must be within the scope of the corporate powers, as prescribed by charter or positive enactment (the extent of which powers all persons are bound at their peril to know); in other words, it must not be *ultra vires* in the sense that it is not within the power or authority of the corporation to act in reference to it under any circumstances. If the act complained of lies wholly outside of the general or special powers of the corporation as conferred in its charter or by statute, the corporation can in no event be liable, whether it directly commanded the performance of the act, or whether it be done by its officers without its express command; for a corporation cannot, of course, be impliedly liable to a greater extent than

1889. it could make itself by express corporate vote or action. \* \* \*

GALLAGHER v. THE MUNICIPALITY OF WESTMORELAND. Allen, C. J.

Such are the general principles of law, concerning which there is no disagreement; but when we come to their application, considerable difference of opinion will be found as to what acts are and what are not *ultra vires*, and what powers and duties are within the meaning of the rule, as stated, corporate powers and duties; for if the duty, though devolved by law upon an officer elected or appointed by the corporation, is not a corporate duty, the officers of the corporation in performing it, do not act for the corporation, and hence the corporation is not responsible (unless expressly declared to be by statute) for the omission to perform it, or for the manner in which it is performed."

In sec. 969 it is said — "The principle that a municipal corporation is bound by the acts of its officers only when within the charter or scope of their powers, and that acts wholly outside of the powers of the corporation, or of the officers appointed to act for it, are void as respects the corporation, is vital; and the opposite doctrine has no support in reason, and very little, if any, in the judgments of the courts."

Assuming that the act of dismissing the plaintiff was within the scope of the powers granted to the County Council by the Consol. Stat., cap. 100, I should have no doubt that this action was maintainable, according to the principles laid down in *Dillon*, as well as in the case of *The Mersey Docks Trustees v. Gibbs* (1).

The case of *Mill v. Hawker* (2) also bears on this point. It was an action of trespass against the members of a highway board and their surveyor, for unlawfully entering on the plaintiff's land and breaking down a gate, claiming that there was a highway through the land, but of which there was no evidence. One question was whether the members of the board were personally liable, they being a corporate body. Pigott and Cleasby, BB., held that the members who voted for the resolution to enter on the plaintiff's land were individually liable, it not being an act which the corporate body was by law authorized to do; but Kelly, C. B., was of a different opinion, and said that the resolution to enter on the land was a

(1) L. R. 1 H. L. 93

(1) L. R. 9 Exch. 309.

corporate act, done at a corporate meeting convened and held in strict conformity to the Act of Parliament; and that it was settled law that no action would lie against the individual members of a corporation for a corporate act done by the corporation in its corporate capacity, unless the act was maliciously done by the individuals charged, and the corporate name was used as a mere color for the malicious act, or unless the act was *ultra vires*, and was not, and could not be in contemplation of law a corporate act at all. And after referring to several cases bearing on the subject, His Lordship added, that he could not doubt that the action ought to have been brought against the board, and that all the decisions were uniform to show that it would have been maintainable.

The case was appealed to the Exchequer Chamber (1), and the judgment of the Court below affirmed on the ground that the surveyor at all events was liable; without expressing any opinion as to the liability of the members of the board, which, Blackburn, J., said, was a question of considerable importance and great difficulty, and which it was not then necessary to decide. The other Judges were of the same opinion.

There evidently was a good deal of doubt in the minds of some of the Judges, as to the correctness of the decision of the majority of the Court of Exchequer that the action was properly brought against the members of the highway board individually, and that the corporation was not liable. Subject to the doubt thrown upon it in the Exchequer Chamber, it is a decision that the act of the members of the board who concurred in the resolution to enter on the Plaintiff's land, was *ultra vires*, and not a corporate act, and therefore the board was not liable.

It was contended on the part of the defendants in the present case, that the County Council had exceeded its authority in dismissing the plaintiff, and therefore the defendants were not liable; that the liability, if any, would be upon those members of the Council who voted for the plaintiff's dismissal.

In considering this question, it will be proper to refer to the powers and duties of Municipalities under the act incorporating them.

1889.

GALLAGHER  
v.  
THE MUNICIPALITY OF  
WESTMOR-  
LAND.  
Allen, C. J.

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(1) L. R. 10 Exch. 92.

1889.

GALLAGHER  
 v  
 THE MUNICIPALITY OF  
 WESTMORLAND.  
 —  
 Allen, C. J.

The defendants were incorporated under cap. 99 of the Consolidated Statutes, the 2nd section of which declares that the ratepayers of every county in the Province, not already incorporated, shall be a body politic and corporate; and, by sec. 3, that the name of every body corporate created under the chapter, shall be "The Municipality of"; and that such corporate bodies shall have, and be subject to all the powers, rights, duties and liabilities made incident to a corporation, subject to the provisions thereafter mentioned.

The 5th section declares that in each county there shall be a County Council, which shall exercise all the powers of the body corporate.

The 127th sec., relating to rights of action and remedies for and against Municipalities, has no application to this case.

The Valuator<sup>s</sup> for each county are appointed by the County Council under sec. 35 of cap. 100, which directs that they shall continue in office for three years; and that a person appointed to fill a vacancy by death, resignation or otherwise, shall hold office during the residue of the term.

If the Council in dismissing the plaintiff were acting within the scope of their power, the Municipality is liable, and this action is properly brought, because, in that case the Council would represent the Municipality. But that question having been determined adversely to the Council by the judgment of this Court on the application for a *certiorari* in *Ex parte Gallagher* (1), it seems to me that, according to the rules of law previously stated as applicable to municipal corporations, the defendants are not liable for the act of the Council, as set out in the first count of the declaration.

The case of *Poulton v. London and South Western Railway Co.* (2), though not a suit against a Municipal Corporation, is, nevertheless, applicable to the present question. There the action was brought for detaining the plaintiff in custody until he paid for the carriage of a horse by the railway; and the question was whether the company was liable for the wrongful act of its servant in so detaining the plaintiff — the company having power to apprehend a person travelling on the railway without having paid his fare, but only power to detain goods

(1) 26 N. B. Rep. 73.

(2) L. R. 2 Q. B. 534.



until their carriage was paid. It was held that the company was not liable, there being no implied authority to the servant to do what the company could not do, and, therefore, his detaining the plaintiff was not an act within the scope of his authority; but, on the contrary, "completely out of the scope of his authority."

1889.  
GALLAGHER  
v.  
THE MUNICIPALITY OF  
WESTMORLAND.  
Allen, C. J.

I therefore think the first count is demurrable.

I think the second count states a sufficient cause of action.

It alleges that the plaintiff was one of the valutors for the county, duly appointed by the County Council for the three years next following the 24th January, 1885, and thereupon it became the duty of the defendants to permit him and the other valutors of the county to make a valuation of the property and income in the several parishes of the county in the year, 1886, as provided by law; and though the plaintiff was ready and willing to proceed with the valuation, with the other valutors, in the last mentioned year, for the performance of which large fees and emoluments would have accrued to him, yet the defendants wrongfully and illegally interfered with and prevented him from acting in such valuation, and illegally and improperly discharged and dismissed him from his said office, whereby he not only lost and was deprived of the profits and emoluments of the said office, but was put to large costs and expenses, etc.

The grounds of demurrer to this count were substantially the same as those to the first count, the only material difference being that one of the objections to this count is that the action will not lie without malice, and that none is alleged. I refer to what I have already said on that point when considering the first count.

Some of the objections to this count assume that it states the ground on which the Council dismissed the plaintiff, as in the first count; whereas it does nothing of the kind, but merely alleges that the Council wrongfully and illegally dismissed him, without assigning any ground; and some of the objections state as facts matters which could only properly be stated in a plea. I refer particularly to the fifth and ninth objections.

The third objection is stated hypothetically. There is

1889.  
GALLAGHER  
v.  
THE MUNICIPALITY OF  
WESTMORLAND.  
Allen, C. J.

nothing in the count to enable the Court to say whether the Council, in dismissing the plaintiff, acted unlawfully or maliciously. I think such a ground of demurrer should not have been stated.

The fourth objection is too general. The defendants may, or may not, be liable for the acts of the Council. That must depend altogether upon the character of their acts.

The fifth objection is quite inapplicable to the second count, which states nothing about any proceedings or resolutions of the Council, or the cause for which the plaintiff was removed.

The sixth and seventh objections seek to raise the point which was practically decided in *Ex parte Gallagher*. If the Council dismissed the plaintiff because he ceased to possess certain property qualifications, the defendants should have pleaded the fact. It does not appear by this count of the declaration why they dismissed him.

The eighth objection does not show any ground of demurrer. How can the Court say, from anything which appears on the face of the count, whether the Council, in dismissing the plaintiff, was acting in reference to a matter within its jurisdiction or not?

So, with respect to the ninth objection. The Court is asked, without having the facts before them showing the grounds of the plaintiff's dismissal, to say whether the Council acted *ultra vires* in the matter.

I therefore think the demurrer to the second count entirely fails.

The third count stated that the plaintiff and one Patrick Hebert were Valuers for the County of Westmorland, and duly qualified to act as such; and it was their duty as such valuers to make a valuation of the property and income in the several parishes, and for that purpose to furnish the assessors of rates of the several towns and parishes of the county liable to be rated for county purposes with schedules or forms to be filled up, as provided by statute; which duty and labor the plaintiff and the said Herbert, as such valuers, did duly perform, and did deliver such forms to the said assessors; and it was the duty of the assessors, on receiving such forms, to ascertain the names of all persons liable to be

rated, and their taxable property and income, and to fill in such forms and return them to the plaintiff and Hebert, whereupon it was their duty, as such valutors, to revise the said schedule and make up a list of the persons liable to be rated; for which duties and services the plaintiff was entitled to be paid a reasonable remuneration; yet the defendants wrongfully, wilfully and unlawfully instructed the assessors not to fill up the said forms and return them to the plaintiff and Hebert, in consequence of which the assessors did not fill up and return the said lists, but refused so to do; whereby the plaintiff and Hebert were hindered and prevented from performing their duties in that behalf, and the plaintiff lost, and was deprived of, certain fees and dues for his labor, and was prevented from earning compensation and reward for his services as valuator.

1889.

GALLAGHER  
v.  
THE MUNICIPALITY OF  
WESTMORLAND.  
Allen, C. J.

The grounds of objection to this count are:

1. That two valutors cannot act; and, therefore, that the refusal of the assessors to act on these notices did not constitute a cause of action.
2. That in order to act at all, the Board of Valutors must be full.
3. That no valuation was made within the meaning of the act, and therefore the plaintiff was not entitled to claim compensation. That any claim for compensation should have been under sec. 104 of cap. 101 Consolidated Statutes.

There were four other objections, similar to some of the objections to the second count, which have been disposed of.

It is consistent with the statement in this count that the Board of Valutors was never complete; or if it was, that one of the members had resigned or died, and that the board was not full at the time the plaintiff and Hebert delivered the schedule to the assessors. If the Board was full, a majority could act under the authority given by the Consol. Stat. cap. 118, sec. 1, sub-sec. 3; but the count does not show that there was a full board at the time referred to. I think there must be judgment for the defendants on the demurrer to this count.

The fourth count stated, that in consideration that the plaintiff, being duly qualified in that behalf, at the special instance

1889.  
GALLAGHER  
v.  
THE MUNICIPALITY OF  
WESTMORLAND.  
Allen, C. J.

and request of the defendants, would enter into their service as a Valuator of the County of Westmorland, and serve them for three years, from the 24th January, 1885, in that capacity, for certain reasonable remuneration, to be paid by the defendants therefor, the defendants promised the plaintiff to retain him in that capacity during the said three years, and to permit him to discharge the duties thereof, and to make the valuation contemplated by law; that the plaintiff entered into the service of the defendants as such valuator on the said terms, and continued therein for a part of the said term of three years, to wit: till the 22nd January, 1886, and until the breach of the said agreement, and was always ready and willing to continue in the said service during the remainder of the said term; that all conditions were fulfilled, and all things happened, and all times elapsed to enable the plaintiff to hold the office and to discharge the duties thereof, and to earn the fees and emoluments thereof; yet the defendants, long before the expiration of the term of three years, to wit, on the 22nd January, 1886, wrongfully, illegally, wilfully and maliciously dismissed the plaintiff from the said service, and refused to retain him for the remainder of the said term, or to permit him to perform the duties of valuator: whereby the plaintiff lost and was deprived of the wages and profits, etc., and was forced and obliged to pay out large sums of money, etc.

The substantial ground of demurrer to this count is, that the defendants could not lawfully contract with the plaintiff, as alleged; that he could only become a valuator by appointment of the Council, under the statute, and be entitled to the remuneration thereby allowed.

As the defendants have, by cap. 99, all the rights and powers of corporations, I am not prepared to say that they could not legally enter into a contract with persons to act as valutors, provided the contract contained nothing inconsistent with the provisions of cap. 100.

I do not dispute the law as stated in Dillon on Corporations, sec. 230, referred to by my brother Tuck, that where the charter of a corporation provides a particular mode of compensation for its officers, there is no implied obligation to compensate them in any other way. But I think this count does not state

any contract at variance with that principle. It states a contract to employ the plaintiff as valuator for three years, "for certain reasonable reward to be paid to him therefor" — substantially the language of sec. 104, relating to the compensation of the valutors and other officers of the municipality. Unless those words make it so, there is nothing at variance with the statute authorizing the Council to appoint valutors, or with their mode of compensation.

Whether the defendants are responsible or not for the act of the Council in dismissing the plaintiff, does not properly arise on this demurrer, as the count does not state the ground on which the plaintiff was dismissed.

I think, with some doubt, that the plaintiff is entitled to judgment on this demurrer.

Coming now to the pleas. I think they are all bad, with the exception of the 6th, 9th and 16th, which I am inclined to think are sufficient.

Several of the pleas raise, in different language, the question which the Court has already decided: viz., that the plaintiff did not become disqualified as a valuator by ceasing, after his appointment, to possess the property qualification which he had at that time; in other words, that having been legally appointed, he was entitled by sec. 35 of cap. 100 of the Consolidated Statutes to hold the office for three years.

Others of the pleas allege, generally, that the plaintiff had become disqualified to hold the office (without stating in what manner he became so), and, therefore, the Council dismissed him. I think such pleas are bad.

The pleas alleging that the plaintiff held the office during the pleasure of the Council, and that they signified their pleasure that he should no longer hold it, and thereupon they removed him, involve the question as to his right to hold the office for three years.

There may be some doubt as to the sufficiency of the sixth plea to the first count, viz., that the defendants did not dismiss and remove the plaintiff from the office of valuator, as alleged; because, while it professes to answer the whole count, it does not deny the passing of the resolutions by the Council, declaring that the plaintiff had become disqualified and should be

1889.

GALLAGHER  
v.  
THE MUNICIPALITY OF  
WESTMORLAND.  
—  
Allen, C. J.

1880.  
 GALLAGHER  
 v.  
 THE MUNICIPALITY OF  
 WESTMORELAND.  
 Allen, C. J.

removed, and the resolution appointing another person in his place. Also, that the plea should have been confined to that part of the count which alleged that the defendants dismissed the plaintiff.

This plea, if it is good, in effect denies the passing of the resolutions. I think, however, that it may be embarrassing, and probably might be struck out under sec. 88 of cap. 37 Con. Stat.; but I doubt whether it is bad on general demurrer. It is, perhaps, bad, as amounting to the general issue; but it was not objected to on that ground. It might have been the ground of an application to a Judge under that section of cap. 37 to have the plea struck out, and the general issue entered instead of it, if that would be any advantage to the plaintiff. Steph. Pl. (7th ed.) 139; 373; Bullen & Leake's Pl. 461.

The ninth plea, pleaded to the second count, is similar to the sixth plea above stated; but the language of the first and second counts is quite different in the statement of the cause of action. The gist of the alleged offence in the second count (as indeed it is in the first count) is the dismissal of the plaintiff from office, whereby he was prevented from acting as a valuator. The plea denies that the defendants dismissed him as alleged, which is the fact to be decided.

The objections to this plea are substantially the same as those to the sixth plea. The dismissal from office is the gravamen of the charge. The preventing the plaintiff from acting as valuator is mere matter of aggravation, or consequential damage, and does not require a specific answer. Steph. Pl. 193. I think the plea is sufficient.

The remarks made upon the sixth plea as amounting to the general issue will also be applicable to this plea.

I also think the sixteenth plea is good. It states that at the time mentioned in the third count there were only two Valuers for the county — the third Valuator having resigned — in consequence of which the assessors refused to fill up and return the lists, as alleged.

As already stated, in considering the demurrer to the third count, I think that two Valuers had no power to act unless the board was full. Where that is the case, a majority can act; but there must be three capable of acting.

In my opinion the plaintiff is entitled to judgment on the demurrers to the second and fourth counts of the declaration, and the defendants are entitled to judgment on the demurrers to the other two counts; but in the opinion of the majority of the court the plaintiff is entitled to judgment on the first, second and fourth counts, and the defendants are entitled to judgment on the third count.

1889.

GALLAGHER  
v.  
THE MUNICIPALITY OF  
WESTMORLAND.

Allen, C. J.

Each party to have leave to amend on the usual terms.

FRASER, J., was of opinion that the plaintiff was entitled to judgment on the demurrers to the first, second and fourth counts of the declaration, and to the second, third, fourth, fifth, tenth, eleventh, twelfth and thirteenth pleas; and that the defendants were entitled to judgment on the demurrers to the third count of the declaration, and to the sixth, ninth and sixteenth pleas.

WETMORE, J., took no part.

*Judgment for plaintiff on the first, second and fourth counts, and on second, third, fourth, fifth, tenth, eleventh, twelfth and thirteenth pleas; and for defendants on the third count, and on sixth, ninth and sixteenth pleas. Both parties to have leave to amend on payment of costs.*

1890.

SMITH, APPELLANT, AND BUCK, RESPONDENT.

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May 3.

*Consol. Stat., cap. 111 — Dog killing sheep — Action against owner — Scienter.*

In an action under Consol. Stat., cap. 111, against the owner of a dog for killing a sheep, it is not necessary to allege a *scienter*.

This was an appeal from a decision of the Judge of the Carleton County Court allowing a demurrer to the writ. The action was to recover damages under cap. 111, Consol. Stat., for the killing of the plaintiff's sheep by a dog owned by the defendant. The writ was demurred to on the ground that a *scienter* was not alleged.

April 12, 1890. *J. A. Van Wart* argued in support of the appeal, and

*A. B. Connell*, contra.

*Cur. adv. vult.*

The following judgment was now delivered:

SIR JOHN C. ALLEN, C. J. I think the appeal should be allowed in this case.

If it is necessary to allege a *scienter* in an action for damages in this Province against the owner of a dog which had maimed or killed a sheep, I do not see why the Act 8 Geo. 4, cap. 18. (of which cap. 111 of the Consol. Stat. is substantially a re-enactment) was passed, as the common law already gave a remedy to a person whose sheep were killed, if the owner of the dog knew of his mischievous propensity. See 2 Chit. Pl. (6th ed.), 401-2; Bul. & Lea. Pl. 367.

The first section of cap. 111 declares that if any dog shall maim or kill a sheep or lamb, the owner of the dog, upon conviction before a Justice, shall cause the dog to be immediately killed.

Sec. 2 enacts that "the owner of any sheep or lamb so maimed or killed, may recover the damage sustained from



the owner of the dog, \* \* \* before any Court of competent jurisdiction, with costs." 1890.

This enactment does not differ materially from cap. 214 of the Revised Statutes of Ontario, under which *Reg. v. Perrin* (1) was decided, and where it was held that in a prosecution against the owner of a dog which killed sheep, it was not necessary to prove that the dog had a propensity to kill or injure sheep.

SMITH

v.

BUCK.

Allen, C. J.

In giving judgment in that case, Armour, C. J., said that section 15 of the Ontario Act (which uses substantially the same words as section 2 of our Act) was clearly not confined to damage occasioned by a dog that had a propensity to kill or injure sheep, but extended also to damage occasioned by a dog that had for the first time killed or injured sheep.

Similar language may be applied to the second section of our Act, which gives the owner of a sheep maimed or killed by any dog, a remedy against the owner of the dog for the damage sustained. There is nothing in the section limiting the remedy to cases where the dog had previously maimed or killed sheep.

It was argued in this case in support of the demurrer, that it was necessary to allege a *scienter*. That by an English Act, 28 & 29 Vic. cap. 60, relating to injuries done to sheep and cattle by dogs, and also by the Ontario statute referred to, it was expressly provided that it should not be necessary for the party claiming damages to shew a previous mischievous propensity in the dog, or the owner's knowledge of it; and that the omission of any such provision in our Act, shewed that the Legislature did not intend to dispense with the allegation and proof of a *scienter*. A similar argument was used in *Reg. v. Perrin* (*supra*); but Armour, C. J., said that though the latter part of the section (15) provided that the aggrieved party should be entitled to recover damages, whether the owner or keeper of the dog knew, or did not know, that it was vicious or accustomed to worry sheep; that provision was wholly superfluous, for it was plain from what preceded the provision, that it was intended that the owner or keeper of any dog should be responsible to the owner of any sheep killed or injured by

1890.

SMITH  
v.  
BUCK.

Allen, C. J.

such dog for the damage occasioned thereby, whether such dog had or had not a propensity to kill or injure sheep, and whether the owner or keeper of such dog knew, or did not know of such its propensity; and that it could not be contended that the introduction of that provision into the section raised any implication against the express words of the Act, of the necessity to establish a propensity in the dog to kill or injure sheep.

Agreeing, as I do fully, in that opinion, I think no inference can be drawn from the omission from our Act of a clause similar to that in the 15th sec. of the Ontario Act, that the Legislature did not intend to relieve the plaintiff in an action against the owner of a dog to recover damages for maiming or killing sheep, from proving his knowledge of the vicious propensity of the dog. I draw the very opposite inference from the language of our Act; and think that the intention was to enlarge the common law liability of the owners of dogs, and not merely to declare by an Act of the Legislature, what was the law already as regards the liability of the owners of dogs for damage done by them to sheep.

Not only in this Province, but in other Provinces of the Dominion, and in many parts of the United States (probably before the Revolution), has it been considered necessary to make some special provision for the protection of sheep against dogs: owing, no doubt, to the comparatively uncultivated state of the country, and the unprotected condition of sheep during the summer.

It is laid down in Sherman & Redfield on Negligence, sec. 202, that in consequence of the prevalent disposition of dogs to worry strange sheep, and the great difficulty of proving the habits of particular dogs, the Legislatures of many of the States have adopted an exception to the general rule upon this subject, and have made every owner of a dog liable for the killing or wounding of a sheep by such dog, without regard to the owner's knowledge concerning the habits of the dog.

A number of the States are named in which such provisions are made; and generally they are, in substance, the same as the provision of our statute.

I think the appeal should be allowed, with costs, and that

the case be sent back to the County Court with directions to enter judgment for the plaintiff on the demurrer, with costs.

WETMORE, PALMER, KING and TUCK, JJ., concurred.

FRASER, J., not having heard the argument, took no part.

*Appeal allowed with costs.*

1890.

SMITH  
v.  
BUCK.

Allen, C. J.

# EX PARTE BENJAMIN KELLY.

1890.

April 18.

*Fisheries Act (R. S. C., c. 95) — Conviction for fishing salmon during close season — Evidence — Appeal to Minister — Certiorari.*

In order to convict a person of illegal fishing for salmon under sec. 8 of The Fisheries Act (Rev. Stat. Can., c. 95), it is not sufficient that the defendant had in his possession a salmon during the prohibited season. There must be some evidence to shew when, where, and in what manner the fish had been caught.

Sec. 18, sub-sec. 6, of the Act does not take away the right of *certiorari*.

February 4, 1890. *Jordan* shewed cause against an order *nisi* for a *certiorari*, granted by His Honor Mr. Justice Fraser to remove a conviction of one Benjamin Kelly, for an offence under section 8 of The Fisheries Act (Rev. Stat. Can. cap. 95).

The objection is that there is no evidence to show that the salmon was fished for, caught or killed in an unlawful manner during the close season. It is submitted that the fact of having a salmon during the prohibited season is *prima facie* evidence of its having been caught at a time and in a manner contrary to law. The *onus* of showing that the fish was caught at a legal time, and in a legal manner, was on the defendant. But if the defendant was wrongly convicted, he should have availed himself of the remedy provided by the Act. Sec. 18, sub-sec. 6, provides an appeal to the Minister of Marine and Fisheries by petition.

*Curr. adv. vult.*

The judgment of the Court (PALMER and FRASER, JJ., taking no part) was now delivered by

TUCK, J. The defendant was convicted before George

1890.

*Ex parte*  
KELLY.

McKean, a Justice of the Peace for the County of York, for having fished for, caught or killed a salmon, contrary to the provisions of cap. 95, sec. 8, of the Revised Statutes of Canada. This section enacts that salmon shall not be fished for, caught or killed, between the 15th day of August and the 1st day of March, in the Provinces of New Brunswick and Nova Scotia. There was no evidence when the fish was caught or killed, but the defendant was found with the salmon in his possession on the 20th day of August. The same section provides that it shall be lawful to fish for, catch and kill salmon with a rod and line in the manner known as fly-surface-fishing, between the first day of February and the 15th day of September, in the Provinces of New Brunswick and Nova Scotia. By sec. 18, sub-sec. 6 of the same chapter, an appeal is given to persons aggrieved by any such conviction by petition to the Minister of Marine and Fisheries, but this is not a judicial appeal.

The question is, can the conviction be sustained when there is no evidence when, or the manner in which the salmon was caught?

In the absence of any provision in the Statute, that mere possession of a salmon during the prohibited season, is sufficient to warrant a magistrate to convict, we think there must be some evidence to shew when and where the fish had been killed.

In the absence of such evidence in the present case, the rule must be absolute for a *certiorari*.

*Rule absolute.*

## STEWART, APPELLANT, AND MUIRHEAD, RESPONDENT.

1890.

May 9.

*Bill of Sale of engine in mill — Substitution of new for old engine — Bill of sale to vendor of new engine to secure purchase money — Knowledge of grantee of old engine — Trover for old engine against vendor of new engine — Estoppel — Correspondence with view to settlement of claim — Admissions without prejudice — Evidence.*

- In 1884, S. held a registered mortgage bill of sale of a steam engine owned and used by C. in his mill. In April, 1887, C. purchased another engine from M., who took the old engine in part payment, and a bill of sale of the new engine as security for the balance. The new engine was put in the mill and the old one taken out and sent to M., without S.'s knowledge. In June, 1887, S. was told by C. that he had made the exchange of engines with M., to which S. made no objection. The mill was afterwards burnt, whereupon S. took possession of the new engine, claiming it under his bill of sale. M. also claimed it under his bill of sale. After some correspondence between S. and M., S. paid M. the amount due him by C., and M. discharged his bill of sale. In an action of trover by S. against M. for the old engine:
- Held by WETMORE, KING and TUCK, JJ., 1. (ALLEN, C.J., and PALMER, J., dissenting), That S. was not estopped from claiming the old engine under his bill of sale.*
2. That the correspondence between the parties with a view to a settlement was admissible, there being no express or implied agreement that the correspondence was to be without prejudice.

This was an appeal from the Gloucester County Court.

January 29, 1890. *Seely* argued in support of the appeal and

*Geo. F. Gregory, contra.*

The material facts of the case and the grounds of appeal will be found fully stated in the judgments.

*Cur. adv. vult.*

The following judgments were now delivered:

TUCK, J. This is an appeal from the County Court of Gloucester. At the trial the plaintiff obtained a verdict, which was afterwards set aside by the Judge of the County Court, and a new trial ordered on the ground of the improper reception of evidence.

The action is in trover for the conversion of a steam engine and shafting.

1890.

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STEWART  
v.  
MUIRHEAD.

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Tuck, J.

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It appears from the evidence that Stewart held a bill of sale by way of mortgage of a certain steam engine and shafting from John F. Carter, dated the 2nd of July, 1884, and filed in the office of the Registrar of Deeds for the County of Gloucester, on the 4th July, 1884.

The consideration mentioned in the bill of sale was \$700, and it contained a proviso that on payment of this sum, on the 1st December, 1885, the mortgage should be void, but on default the property should vest absolutely in the appellant. Carter made default in payment but continued in possession of the engine until the spring of 1887. This was a Waterous engine, and was used for the purpose of running a mill near Bathurst. This mill was a frame building, built partly on piles and partly on the land. It contained the engine, shafting and boiler, planing machine, log carriage and fixtures, belting, shingle machine, box saws and fixtures. The engine was bedded in the earth on timber, to which it was fastened by bolts.

In the spring of 1887, Muirhead agreed with Carter to make for him a more powerful engine, called in the evidence "the new machine," and to take the old engine and shafting (conveyed under the bill of sale to appellant) in part payment of the new engine. Carter, in his evidence, says that he saw Stewart at the mill once when he was putting in the new engine; that it was about the 10th or 15th of June that he shipped the old engine to Muirhead, and thinks that he had put in the new engine before he shipped the old one. That it was not until after the fire, in the fall of 1887, that he had any conversation with Stewart in regard to the old engine. Stewart, in his evidence, says that some time early in the summer of 1887—June or July—he knew the old engine was gone. Having gone to the mill, he saw the new engine, and asked Carter where he got it, and Carter told him he had made a trade with Muirhead. This was all the conversation he had until after the fire. Whilst the negotiation was going on, Carter made no mention to Muirhead of the bill of sale to Stewart. Carter gave the respondent promissory notes for the balance of the purchase money, and to secure their payment gave him a bill of sale of the new engine. In November, 1887, and before

the maturity of the last promissory note for \$184.50, the mill, containing the new engine, was burnt, whereupon the appellant took the remains of the machinery, including remains of new engine, into his possession. A few days after the fire the respondent came to Bathurst, and claimed the remains of the new engine under his bill of sale. He was accompanied at this time by Richard A. Lawlor, his solicitor, who conducted negotiations for him with the appellant.

1890.  
STEWART  
v.  
MUIRHEAD.  
Tuck, J.  
—

Up to the time of the fire, respondent says that he had no notice that Stewart, or any one else, had any claim on the engine. After the fire, there were at least two attempts made to effect a settlement between appellant and respondent, carried on for the respondent, chiefly by his solicitor, R. A. Lawlor. As to Lawlor's power to act for him, the respondent in his evidence says: "After the fire, I had some negotiations with Mr. Stewart. Mr. Stewart asked me what I would give for the new engine, as he claimed it. The negotiations were through myself, Mr. Lawlor, and correspondence with me; he (Lawlor) told me he had letters from Mr. Stewart, and communicated the contents to me; did not ask me how to answer it; he had authority to correspond, but not to settle anything. He says, also, that we — myself and Lawlor — told Stewart that we would take away the new engine unless it was paid for. I spoke to him myself, personally; the principal conversation was by Mr. Lawlor."

No settlement having been made and acted on, eventually the appellant paid the respondent the amount (\$184.50) of Carter's note, together with certain costs, and took a discharge of respondent's bill of sale on the new engine. Stewart says that they accepted his offer; that if he would pay the amount of the note, interest and protest charges, they would give a discharge of their bill of sale and run the risk of his suing them for the old engine. The appellant then brought this action.

Apparently the only question left to be tried between the parties was, which of them should lose the value of the old engine.

It is not disputed that the chattel mortgage to Stewart was given for a good consideration. But it is said that Stewart

1890.  
STEWART  
v.  
MUIRHEAD.  
Tuck, J.

was aware of the negotiation going on between Carter and Muirhead for the exchange of the old engine for a new one, and that he allowed Carter to deal with the old engine as if he had complete title to it; that by his conduct, with full knowledge of what was being done, he allowed the bargain to be made, and the old engine to be shipped to Muirhead, and that he is therefore estopped from saying that the property is his. I have carefully read the Judge's charge to the jury, and have found that he left this question distinctly to them; their verdict was for the plaintiff, and the Judge of the County Court was not dissatisfied with their finding, but set aside the verdict, because he thought some evidence had been improperly admitted. The Judge's charge was favorable to the defendant, but he left the questions of fact fairly to the jury, and I think there was ample evidence to warrant their verdict.

In resisting this motion the respondent, in addition to the improper admission of evidence, relies upon the grounds of misdirection, taken before the Judge of the County Court in moving for a new trial. He complains that the Judge was wrong in what he said to the jury, as to the legal effect of Stewart's silence, and making no objection for five months after he knew of the removal of the old engine. What the Judge did charge, was, that he could not agree with the view of defendant's counsel, that Stewart's silence would operate as an estoppel to his recovering in the action. And then he told the jury that they might consider this fact, with other circumstances, in aiding them to come to a conclusion whether or not the plaintiff assented to the exchange of the old engine. I think that the defendant has no good reason for objecting to this direction.

Then it is contended that the Judge should have left the question of fraud or no fraud, in so many words, to the jury. In my opinion the Judge was not called upon to do this. He told the jury that if the plaintiff stood by, and being aware of the negotiation, allowed the old engine to be exchanged, without objection on his part, he could not maintain the action; but if, on the contrary, Carter negotiated for the exchange independently of Stewart and without his knowledge, and took the engine out of the mill and bartered it away, then there



should be a verdict for the plaintiff. The question of fact upon which fraud was charged was, I think, properly left to the jury.

Again, the respondent's counsel says that the Judge was wrong in not telling the jury that from the evidence of possession in fact by Carter of the old engine, from the time the bill of sale was given to plaintiff until it was shipped to Muirhead, under the circumstances disclosed in the evidence, the plaintiff was estopped from disputing defendant's title in the property, and in not directing the jury that the acts of Stewart and Carter shewed strong presumptive evidence of fraud.

I think it was no part of the Judge's duty to give such direction. It was sufficient for him to call the jury's attention to the facts of the case, state the law as bearing on those facts, and leave the question of fraud to them. It was argued that the mere fact that Carter was allowed by Stewart to continue in possession of the old engine from 1884 till 1887, gave Carter an implied license to sell. I cannot agree with this contention. This case is wholly unlike a bill of sale of merchandise in a shop, or goods, chattels and effects on a farm, which are being disposed of from time to time in the ordinary course of business. A sale of such goods, without notice of the bill of sale, would give a valid title to purchasers. Here, however, was a stationary engine, fastened to the land by timbers and bolts, and it was not in the ordinary course of Carter's business to sell and dispose of engines. The plaintiff did what the law required him to do. He filed his bill of sale with the registrar of deeds for the County of Gloucester where the property was situate, and this was evidence of his *prima facie* title, to everyone who chose to look at the records. If Mr. Muirhead saw fit to bargain for the property, and take delivery of it, without consulting the records, he ought not to complain now, if he failed to get a good title. Such cases as *National Mercantile Bank (Limited) v. Hampson* (1), and *Babcock v. Lawson* (2), are altogether inapplicable to the present one. As to the equity of the case, it appears pretty clearly from the evidence, that when the plaintiff and defendant finally settled for the new engine, it was an independent transaction, and

1890.

STEWART  
v.  
MUIRHEAD.  
—  
Tuck, J.  
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(1) 5 Q. B. D. 177.

(2) 5 Q. B. D. 224.

1890.  
STEWART  
v.  
MUIRHEAD.  
Tuck, J.

that the right of property in the old engine was to stand upon its merits; Muirhead taking the chances, either that Stewart would not commence a suit, or if he did, that he would fail.

There remain to be considered the points taken as to the improper admission of the contents of letters written by plaintiff to R. A. Lawlor and received from him. I think the evidence of the respondent, already quoted, shews conclusively that Lawlor had authority to act and correspond as his agent, and that what he did or wrote within the scope of his authority would be receivable in evidence, just the same as if it had been done or written by Muirhead. It seems that the letters referred to had been lost or destroyed, and were not produced at the trial. As stated by Stewart, and not contradicted, he wrote to Lawlor and asked him to remit the amount, \$250, agreed on settlement, and Lawlor replied that Muirhead would not agree to that settlement. Then Stewart wrote again to Lawlor, expressed his surprise that the agreement had not been carried out, and said that the only course for him to pursue was to pay up their claim on the engine he held in possession, and replevy the old engine they held. Mr. Lawlor replied to this that he would accept the amount due on the engine (new one), some \$184 and costs; that they would give a discharge of their bill of sale on the engine plaintiff held in possession, and he was to give a discharge of his bill of sale on the old engine. Finally, the defendant accepted about \$188 due him on the new engine, discharged his bill of sale thereof, and did not receive a discharge of plaintiff's bill of sale. From the question which arose and was determined at the trial, namely, the plaintiff's fraudulent acts in dealing with Carter, it seems to me entirely immaterial whether this evidence was received or not. Attempts at settlement, which proved abortive, were made between plaintiff and Lawlor, and finally it was agreed that Stewart should have the new engine if he paid what was due Muirhead, together with some costs. Any previous effort at settlement could not affect the rights of the parties as to the old engine and its value; nor did it, in my opinion, in any way influence the verdict. The value, \$100, put by the jury on the old engine, is the very amount

named by the defendant, himself, not the \$160 allowed by him to Carter in the exchange. 1890.

STEWART  
v.  
MUIRHEAD.  
Tuck, J.

The Judge in the Court below thinks that this evidence, and also a conversation between the plaintiff and Lawlor, were objectionable, on the broad ground, as he says, "that offers or propositions between litigating parties, expressly or impliedly made without prejudice, should be excluded on grounds of public policy. All men must be permitted to buy their peace without prejudice to them, should the offer not succeed," citing Taylor on Evidence, sec. 795. This is sound law, but does not apply here. Anything that was said or written between the plaintiff and Lawlor was not expressly stated to be without prejudice, nor do I think it was so impliedly. At the most, so far as it can be gathered from the evidence of conversation and letters which passed between plaintiff and Lawlor, the plaintiff offered to take \$250, and thought it had been accepted, and Lawlor offered to pay \$100. But nothing came of either offer, and another arrangement was made. The evidence here seems to be within the authority of *Wallace v. Small* (1), that "an offer of a specific sum by way of compromise is admissible in evidence, unless accompanied with a caution that the offer is confidential, or without prejudice."

I think that this appeal must be allowed with costs, and the verdict in the County Court be restored.

KING, J. This is an action of trover. The plaintiff obtained a verdict, but the learned Judge of the County Court of Northumberland granted a new trial, and this appeal is from that decision.

It appears that Stewart held a bill of sale from one Carter of a mill building, machinery and engine, which was duly registered. Afterwards Carter purchased a new engine (with other machinery) from Muirhead, the defendant, giving the old engine in exchange as part payment. Muirhead took a bill of sale on the new engine to secure the balance, for which a note was given. Stewart did not know of the exchange at the time it was made, but he saw the new engine when it was being put in, or shortly afterwards, viz.: about June or July, 1887. In

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(1) M. & M. 446.

1890.

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STEWART  
v.  
MUIRHEAD.

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King, J.

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November, 1887, the mill was burned, and the machinery and engine much damaged. Stewart remained silent respecting the change of engine, but he did not know until after the fire that Muirhead held a bill of sale upon the new engine.

After the fire, Stewart took possession of the ruins, and he appears to have thought that the new engine would, as a substituted engine, be covered by his bill of sale. His bill of sale, however, did not provide for the substitution of machinery or engines. The defendant, Muirhead, went to Bathurst, accompanied by his attorney, Mr. Lawlor, to see about the engine. The parties met, but as they appeared not to be sufficiently friendly to talk over the matter, communications were carried on through Lawlor, between Stewart, who was in one room, and Muirhead, who was in another.

After the return of Muirhead and Lawlor to Chatham, Stewart wrote Lawlor, asking that an amount be paid him as per settlement, Lawlor wrote in answer that Muirhead did not admit any such settlement. Plaintiff then wrote Lawlor that he would pay Muirhead the amount due on Carter's note to Muirhead upon getting Muirhead's discharge of his bill of sale on the new engine, and would look to Muirhead by a suit for the old engine.

Lawlor wrote adversely to this proposition ; but the plaintiff states that these were the terms on which the transaction was finally concluded. The defendant denies this.

What is clear is, that the plaintiff paid the balance due on the Carter note and that Muirhead discharged his bill of sale on the engine.

The question of fact left outstanding is whether this was in complete settlement of the matter, or whether Stewart's right to proceed against Muirhead for the old engine was reserved. The jury appear to have found in favor of Stewart's account of the transaction. The new trial was moved for on several grounds, and was granted on the ground of improper admission of the correspondence between Stewart and Lawlor.

Lawlor's agency is pretty clear. Muirhead admits that Lawlor had authority to correspond with Stewart. One objection to the admission of the correspondence is that it was without prejudice. The late Mr. Seely, who argued the case

with his accustomed thoroughness, contended, in reply, that there was nothing from which such an implication can be drawn. In this I think he was right. See *Wallace v. Small* (1).

1890.

STEWART  
v.  
MUIRHEAD.

King, J.

The learned Judge of the County Court decided that the letters were inadmissible, because the plaintiff thereby made evidence for himself; but to this it is replied that if otherwise relevant and material and unobjectionable, they are not open to the objection taken to them, inasmuch as plaintiff's letters are necessary to be seen in order to understand Lawlor's (i. e. defendant's) replies. They are all part of a continuous correspondence, and are on the same footing as oral conversation between the parties would be.

Mr. *Gregory* argues that the letters do not contain terms of settlement, but merely negotiations leading up to or respecting terms of settlement. But it would appear as if what was written, and what was afterwards verbally concluded, may very well be all part of the transaction. In order to judge of it, we may look at the whole. It is different where the concluded transaction is in writing; there, of course, prior verbal communications are not admissible. But as a matter of evidence, how can we be sure that we can understand the subsequent verbal arrangement unless we know what went before?

Mr. *Seely* also says that on the trial the defendant denied, at first, having received the old engine, and that the letters were material as containing a statement by necessary implication that he had received it. Thus Mr. Lawlor in one letter argues that the alleged agreement would not have been made unless defendant got the old engine.

Mr. *Gregory* contends that no fact is thereby admitted. But I think it is so strongly implied as to be equivalent to a positive statement. At most, I think the objection resolves itself into one of irrelevancy, and upon such a matter the action of the Judge on the trial is almost conclusive.

Mr. *Gregory*, however, claims to rely on the other grounds taken below, on the motion for new trial. He especially relies on the third ground of motion, viz: misdirection of the learned Judge in telling the jury that Stewart's not making claim for

1890.  
 STEWART  
 v.  
 MUIRHEAD.  
 ———  
 King, J.

five months after he knew of the exchange should not operate against him if the jury should come to the conclusion that the taking of the old engine by defendant was wrongful against plaintiff, although the jury might look at the conduct of Stewart after the exchange to determine whether the exchange was with his consent. Mr. *Gregory* contends that this direction is too narrow, and that it excludes the notion of a subsequent ratification.

But Stewart's silence was put forward as a ground of estoppel, and no question of ratification appears to have been raised. But whether so or not; inasmuch as the undisputed evidence is that Stewart did not know of Muirhead or any one else having a bill of sale on the new engine, I think his silence does not affect him.

In order to ratify he must know the facts. If he supposed that Carter was substituting a new engine for the old one and that no one had a lien or claim upon the new engine, he might well ratify it; but if the fact was that the new engine was subject to a prior charge, Stewart might decline to ratify; and if he was ignorant of the fact, his conduct would neither estop him nor prove a ratification. Then further as to an alleged estoppel, there is, so far as I see, no proof of Muirhead having changed his position by virtue of Stewart's silence.

As to estoppel by silence, see *Freeman v. Cooke* (1). In *Polak v. Everett* (2), Blackburn, J., at p. 673, says: "In *Pickard v. Sears* (3) it was held that he who stands by and sees another alter his position on the faith of a fact which he can contradict, cannot afterwards take advantage of that alteration. But the rule was corrected in *Freeman v. Cooke*, where it was said that if a man stands by and allows another to act without objecting, *when from the usage of trade or otherwise there is a duty to speak*, his silence would preclude him as much as if he proposed the act himself."

Mr. *Gregory* also complains as to the fifth ground, and contends that by accepting Muirhead's discharge of his claim on the engine, plaintiff was estopped from claiming the old engine. But obviously this depends upon whether or not Stewart has given a correct account of the agreement. For if, as he says,

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(1) 2 Exch. 654.

(2) 1 Q. B. D. 600.

(3) 6 A. & E. 400.

his right to proceed for the conversion of the old engine was reserved to him in the arrangement that was made, there can be no such estoppel as that last contended for.

Mr. Gregory also referred to *National Mercantile Bank v. Hampeon* (1), and *Babcock v. Lawson* (2), in support of a contention that Carter had an implied license to sell the engine. The latter case has no real bearing on the question. As to the first named case, it was one where there was a bill of sale of growing crops, and of all goods, etc., which then were or thereafter should be on the farm and premises of S., a farmer and dealer. It was held that, having regard to the terms of the bill of sale, there was an implied license for the grantor to carry on his business and to sell the wheat, and any *bona fide* purchaser from him would have a good title. See also *Vassie v. Vassie* (3). But here no such license can be implied. There was no provision for substituted machinery, and there was nothing in the nature of the business carried on, or of the subject matter, which would denote that the engine or machinery was to be treated as merchandise and saleable.

The result, therefore, upon the whole is, that the appeal is to be allowed with costs, and that the County Court Judge is to refuse a new trial.

WETMORE, J., agreed that the appeal should be allowed.

PALMER, J. The single point in this case is, whether the appellant or respondent owned an old steam engine that had been in a mill of which the appellant had a conveyance, or claimed to have such by way of mortgage from one Carter, Carter being in possession of and working in the mill. Whilst so in possession Carter bought from the defendant a new engine for which he was to pay by giving the old steam engine and a sum of money beside. With this understanding the new engine was substituted in the mill for the old one, and the appellant claimed it by virtue of his mortgage. There was also evidence that the appellant knew of the change of the engine by Carter, and did not object to it. This, I think, would be quite enough to prevent him from afterwards

1890.

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 STEWART  
v.  
MUIRHEAD.  
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Kings, J.  
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(1) 5 Q. B. D. 177.

(2) 5 Q. B. D. 284.

(3) 22 N. B. Rep. 76.

1890.

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STEWART  
v.  
MUIRHEAD.

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Palmer, J.

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claiming that Carter had no authority to exchange it, but I desire to put my decision on a higher ground, and it is this: that it would be impossible for the appellant to deny Carter's right to exchange the old engine for the new, and at the same time claim and get the benefit of such exchange. For, if the appellant had denied Carter's right to exchange, it would be respondent's right to rescind the whole contract, and no title to the new engine would pass either to Carter or the appellant; and the appellant not doing this, but instead claiming the title to the new engine through Carter by virtue of the exchange, the defendant would be effectually prevented from claiming the new engine, and therefore the appellant is estopped by such conduct—in fact, I think, it would be impossible for the appellant to have both engines by virtue of such an exchange. If Carter had no authority to make the exchange, or give the old engine for the new, then the appellant could have repudiated the transaction as soon as he heard of it, and that was his clear duty to the respondent. He should have claimed the old engine and not the new one; in which case the property in the old would never be in the respondent. Therefore, as the appellant had claimed the new engine after he had knowledge of what the transaction was, this was a ratification and assent to what Carter did.

It is said that the appellant has paid for the new engine by the settlement with the respondent; but it appears this is not so. All he paid was the balance of the purchase money that was due after crediting the old engine, and if previous to that settlement the rights of the parties were as I indicated above, and that the appellant then had no claim to the old engine for the reasons I have given, it surely cannot be said that the settlement gave any such right, for it was distinctly agreed that such settlement should not affect any rights, but that they should remain, *quoad* the old engine, just as if that settlement had not been made. I therefore think we have to decide the case just as if that settlement was out of the case entirely, and we have no right to consider any of the facts except such as existed before that settlement was made; and such facts are as I have above stated quite irrespective of the settlement altogether. I therefore think this appeal ought to be dismissed.



SIR JOHN C. ALLEN, C. J. The facts of this case, shortly stated, are as follows: The plaintiff (appellant) in 1884 was the legal owner, under a bill of sale duly registered under the Consol Stat. cap. 75, of a steam engine in possession of one Carter, who used it in his mill at Bathurst. In the early part of the year 1887, Carter wishing to get a more powerful engine, applied to the defendant who supplied him with one in April for the sum of \$690, taking as part of the payment, the engine which Carter had in use, at the sum of \$160, the balance being settled by a promissory note for \$330, payable in four months, and \$200 in money; and also taking a bill of sale of the engine as security.

1890.

STEWART  
v.  
MUIRHEAD.

The new engine was put into Carter's mill, and the old one taken out and sent to the defendant. This change of engines was made without the plaintiff's knowledge, but it was not done secretly. In June or July, 1887, the plaintiff knew that the old engine had been taken out of the mill, and the new engine put in its place, and he asked Carter where he got it, and Carter told him that he had made a trade with the defendant, to which the plaintiff made no objection, and the new engine continued to be used by Carter in the mill in the place of the old one, until the mill was burnt in November, 1887.

After the fire, the plaintiff took possession of the engine, claiming it under his bill of sale. Shortly after this, the defendant went to Bathurst for the purpose of taking possession of the engine under his bill of sale. After a good deal of discussion about a settlement, without coming to any conclusion, the parties separated, and a correspondence was commenced between the plaintiff and the defendant's attorney, in which the plaintiff stated his intention to replevy the old engine unless an alleged arrangement was carried out. The correspondence was not produced, having been destroyed, but the plaintiff stated the effect of it, as follows: That the defendant's attorney wrote in answer to a letter of the plaintiff's, that the defendant would accept the amount due on Carter's note, given as part payment for the engine, amounting to about \$188, and discharge his bill of sale on the engine in the plaintiff's possession; and that the plaintiff would give the defendant a discharge of his bill of sale on the old engine

1890.

STEWART  
v.  
MUIRHEAD.  
Allen, C. J.

the defendant to run the risk of the plaintiff suing him for the old engine.

In pursuance of this arrangement the plaintiff paid the defendant the amount due on the note, and the defendant gave the plaintiff a discharge of his bill of sale on the new engine; but it did not appear that the plaintiff had discharged his bill of sale on the old engine.

There is no doubt that the plaintiff, under his bill of sale, had the title to the engine in the defendant's possession, and is entitled to maintain this action unless he has lost his right by allowing Carter to dispose of it, or by his subsequent conduct.

It was objected that the plaintiff, by allowing Carter to deal with the engine as his own, had induced the defendant to purchase it, and was therefore estopped from saying that the engine was not Carter's property, and that he had not the right to sell it. But the evidence does not sustain this objection, because the plaintiff had no knowledge of the exchange of the engines till several months after the exchange was made, and after Carter had got possession of the new engine, from the defendant, and put it in his mill.

But another question arises, viz.: whether the conduct of the plaintiff, after he knew that Carter had given the old engine to the defendant in part payment for the new one, had not, by making no objection to the exchange, acquiesced in what Carter had done, and recognized his right so to deal with the old engine, and thereby estopped himself from disputing the defendant's right to it? I think he did; and that the case comes within one of the principles of estoppel laid down in *Freeman v. Cook* (1).

The plaintiff cannot deny Carter's right to exchange the old engine for the new one, and at the same time claim the benefit of the exchange by setting up a claim to the new engine which Carter got by the exchange. He cannot both approbate and reprobate.

I think the appeal should be dismissed.

*Appeal allowed with costs.*

## DOE DEM. KEITH v. COREY.

1890.

April 18.

*Voluntary conveyance — Securing maintenance and support of grantor — Whether void as against creditors — Intention of parties — Question for jury.*

Where the consideration of a conveyance of land is an agreement to support the grantor (the conveyance being of all the grantor's property), and it is made *bona fide*, with no intention to defeat or delay creditors, and the grantee has no knowledge that the grantor is indebted at the time, such a deed is good, even though the effect of it may be to prevent creditors getting their pay. The intention of the parties under all the circumstances is the fact to be determined by the jury.

This was an action of ejectment, tried before His Honor Mr. Justice Wetmore, at the Queen's Circuit, in July, 1889. Verdict for the defendant.

The facts are so fully referred to in the judgment of the Court that they need not be given here.

February 7, 1890. *Blair, A. G.*, on behalf of the lessor of the plaintiff, moved for a new trial on the ground of misdirection. The evidence shews that the defendant knew at the time the deed was given him by Clark, that he was taking the whole of Clark's property, real as well as personal. This of itself was sufficient to put the defendant upon his guard. It is also submitted that the defendant knew that Clark had creditors, and that the taking of the deed to himself would prevent the creditors from recovering their claims. The learned Judge should have directed the jury that the conveyance by a debtor of his entire estate for the purpose of securing future maintenance and support, is fraudulent and void under the Statute of Elizabeth, as being made to defeat, hinder and delay creditors. See *Freeman v. Pope* (1); *Spirett v. Wilhows* (2); *Twynne's Case* (3); *Dewey v. Roynton* (4); *Doe dem. Parry v. James* (5).

*Alward, contra.* It is the policy of the law to afford certainty to titles to real estate *bona fide* obtained and for valu-

(1) L. R. 5 Ch. 538.  
(2) 3 DeG., J. & R. 298.  
(3) 1 Sm. L. Cas. 1.

(4) 6 East 257.  
(5) 16 East 212.

1890.      able consideration. Before the plaintiff can recover in a case like this, he must prove either that the purchaser knew of the debts of the seller, and his intention to defraud his creditors, and thus become a party to the fraud, or that the circumstances were such that the purchaser was thrown upon his guard, and that a reasonable man must have known the transaction was fraudulent. The facts here were left to the jury with proper direction, and they found for the defendant, and their finding should not be disturbed. The authorities cited refer to voluntary conveyances. Bump on Fraudulent Conveyances, 45, 490, 493 and 496. Here the defendant paid \$200, and gave his bond to support Clark during his lifetime.

*Doe dem.*  
*KEITH*  
*v.*  
*COREY.*

*Blair, A. G.*, in reply.

*Cur. adv. vult.*

The following judgment was now delivered :

TUCK, J. This action of ejectment is brought to recover a farm of one hundred acres of land in the Parish of Brunswick, Queen's County. The question involved in the suit is the validity of a deed, dated the 5th day of April, 1882, and registered the 3rd day of November, 1883, from Elijah Clark to the defendant. The plaintiff contends that this deed is fraudulent and void, under the Statute of 13 Elizabeth, cap. 5, because it was made to defeat, hinder and delay creditors. At the trial, the defendant obtained a verdict; and this is a motion for a new trial, on the grounds of non-direction and misdirection of the learned Judge.

Just before the deed was made, Clark, who was seventy-three years old in March, 1889, owed Elisha C. Corey, a brother of the defendant, two hundred dollars. He also owed the plaintiff thirty-eight dollars, and Sydney S. Stockton, thirty dollars. It is not clear from Stockton's evidence what Clark did owe him, for one part of his statement contradicts another part. I feel it necessary to give his evidence as it appears in the stenographer's notes. Evidence in chief :

Q. " Was he in your debt prior to and in the month of April, 1882 ? A. I think he was. Q. Have you any doubt about it ? A. None. Q. You subsequently brought a suit

against him and recovered a judgment; how much did he owe you the 5th of April, 1882? A. Something upwards of thirty dollars; and after that he came to me to hire money; and I had the money, but I had use for it, and he said: If the suit goes on, my stuff will be sold and I will be ruined. So I went and hired the money, and joined a note with him, with the very money that I had sued him for. Q. At this time he was not owing you the amount of that note, but you had joined a note with him? A. Yes. Q. And the note came due when? A. In about six months. Q. And you had to pay it afterwards? A. Yes, I took it up. Q. Both of these amounts together were included in the suit? A. No, the suit was only for the amount of the note, which I had joined with him, and interest. Q. The note that you took up was the note that you got judgment on. A. Yes. Q. Was the first note or the second note running at this time in April, 1882? A. I am not positive about that. He paid it, however, some time in April, I think. Q. Did you not say you had to pay it? A. Oh, no! the \$30 note. Q. Was not the \$100 standing in one form or other at this time in April, 1882? A. Yes, the interest I had to pay was included in the note. Q. At the time you speak of in April, 1882, this \$100 debt was running? A. Yes. Q. And you got your money afterwards, through Mr. Keith? A. Yes, every cent of it."

Notwithstanding the answers to the last three questions, when apparently the witness was being pressed by the Attorney General, I am satisfied from the previous part of his testimony, given freely, and as the witness knew the facts to be, that on the 5th of April, 1882, Clark owed Stockton \$30, for which he had brought suit. That afterwards Clark, through Stockton, borrowed one hundred dollars, for which Stockton joined with him in a note to the lender, payable in about six months; that out of the \$100, Stockton retained the \$30 due him, and when he had to take up the \$100 note, he sued Clark and recovered judgment against him for the money so paid, with interest and costs. I have no doubt that this is the correct interpretation of Stockton's evidence. So in reality the \$30 having been paid, there was only left, (omitting for

1890.

*Doe dem.*  
KEITH.  
v.  
COREY.  
Tuck, J.

1890.

*Doe dem.*

KEITH

v.

COREY.

Tuck, J.  
—

the present the \$200 due Elisha Corey), one debt due the plaintiff, for thirty-eight dollars.

Elijah Clark, who had lost his wife in the year 1881, and is spoken of as being old and childless, and incapable of managing or taking charge of his farm, entered into an agreement with the defendant, his nephew, on the 5th of April, 1882, whereby he was to pay the debt of \$200 due Elisha Corey; maintain and support his uncle, Clark, for his natural life, and give him ten dollars a year as pocket money. In consideration whereof Clark was to convey his farm of one hundred acres to the defendant, together with his stock and farming utensils. This agreement was carried into effect. A deed of the farm and an assignment of the stock were made to the defendant, who paid the debt due Elisha Corey, and went to live on the place, the old man living with him. The defendant says that it was part of the agreement that he was to give Clark a life lease of the farm, and that this lease was never given; that he does not remember to have talked with R. T. Babbit on the subject of the life lease; nor does he remember any such talk with him, as that, if he gave a life lease it could be taken by creditors, or that if he gave a life lease and had it recorded, it would be seized for debt. R. T. Babbit was not called to give evidence, although it is said he lived at Gagetown, where the cause was being tried. Elijah Clark, when called in rebuttal, was asked this question: "What was it that Corey told you about the life lease that Mr. Babbit had told him?" A.—"You know that he would not give me a life lease when he promised me. He said he could not give me a life lease; if he did, if I owed anything, they could take the place for it. I asked him who told him, and he said Mr. Babbit."

It is a little singular, if this conversation did take place, that Mr. Babbit was not called, and that it was left to this old man's memory of what the defendant told him. Surely Babbit's would have been the best evidence of what was said to him.

The consideration named in the deed was \$700; the real consideration was what I have already stated. A bond, conditioned for the performance of the defendant's agreement as to support, etc., was given by him to Clark in November, 1883,

and Clark's deed to him was not registered until after this bond had been given. The reason given by the defendant, why the bond was not given at the same time that the deed, was that Howard Alward, the justice, who prepared the deed, had no form of bond with him.

Susan A. Corey says the Clark place was worth \$700 in April, 1882; and defendant's counsel says that \$700 was put as consideration in the deed, because that is what all the parties thought at the time the place was worth. The defendant says that the personal property, when he got it, was worth about two hundred and sixteen dollars. There is no other evidence as to the value, except what James Clark says the defendant told him. He says that he had some talk with the defendant, particularly a short time after he came there; that he told him that he had made a good bargain, and that he thought he had as good as fifteen hundred dollars after the debts were paid.

The defendant in his evidence says that when he purchased this land from Mr. Clark, he (defendant) had no knowledge that Clark owed Keith a debt of \$38; nor that he owed Stockton, nor that he owed any debts whatever. There is no evidence anywhere that defendant had any such knowledge.

On the 2nd of February, 1884, Sydney S. Stockton recovered a judgment in the Queens County Court against Clark for \$142.05. Upon this judgment an execution was issued; the land in question was sold and was purchased for \$185 by the plaintiff, to whom the Sheriff of Queens gave a deed, dated the 13th of March, 1885.

I think, that upon this case properly left to them, the jury were justified in finding for the defendant; and if the cause were sent down for another trial, with the same evidence, there would be the same result. Had I been sitting in place of the jury I would, in like manner, have given a verdict for the defendant.

The *Attorney-General* in moving for a rule, complained generally that the effect of the charge was to make light of the whole case; that the law was not intelligently left to the jury, or in such a manner as to enable them to pass upon the question of fraud under the circumstances of this case. I differ entirely

1890.

*Doe dem.*

KEITH

v.

COREY.

Tuck, J.

1890.

*Doe dem.*  
KEITH  
v.

COREY.

Tuck, J.  
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from this sweeping assertion. I have read the charge carefully more than once, and have come to the conclusion that the law was correctly stated to the jury, and all the facts necessary to enable them to consider intelligently the issue being tried, were fully presented. My own opinion is, that the case was comparatively a trivial one, and upon all the facts narrated, there could not possibly have been much fraud lurking in the minds of those two farmers, uncle and nephew, when they made the agreement in April, 1882. At the utmost, at the time the deed was executed, there were only two creditors of Clark, whose debts together amounted to only \$68. One can hardly think that, for so small an amount, these two men would enter upon and complete a transaction so important, with intent to defeat and delay these two creditors. The evidence, to my mind, is conclusive that the defendant, when he made this agreement, had no knowledge that his uncle owed a dollar outside of Elisha Corey, and had no reason to suspect there were any debts against him. He might well have supposed, knowing, as he did, of the loan, that when Elijah Clark borrowed \$200 of Elisha Corey, in November, 1881, that this money would clear off all his debts. It cannot be gathered from the testimony of the old man, who was called by the plaintiff, and who appears for some unexplained reason to have been wholly in his interest, that the fact of his indebtedness, or any fraudulent intention, was ever even hinted at by himself or the defendant. I think the tendency of the testimony as a whole, is to convince an unprejudiced mind that the transaction was an honest one.

I think the learned Judge again and again stated to the jury that if they believed the evidence of Clark's indebtedness, they were warranted in finding against the deed, provided they were satisfied of the fraud. It may be that different persons entertain diverse notions as to what constitutes a proper explanation of fraud upon creditors, in respect of the transfer of a debtor's property. But I incline to think that any reasonably intelligent jury would understand what is meant by such fraud from the Judge's charge.

The attention of the jury was called to the consideration named in the deed, and all the other circumstances from



which they might infer an intention on the part of the debtor to defeat and delay his creditors. I think the Judge was quite right in not telling the jury that the real consideration was inadequate, and that the transfer of his whole estate, and the making of such transfer to provide for the debtor's future support, were each and all of them facts and circumstances from which the jury ought to infer an intention to defeat and delay creditors. The learned Judge referred to all these facts, and gave them their proper weight in relation to other facts when addressing the jury. In my opinion, the Judge would have been wrong had he told the jury, as an abstract proposition, that a conveyance of the debtor's whole estate, for the consideration wholly, or substantially, of the future support of the debtor, is fraudulent and void as against creditors. Equally wrong would he have been had he directed that such a deed is void even against subsequent creditors, and that the jury might, from such a deed, infer an intention to defeat and delay creditors. And yet it was contended that this is the law. Cases were cited as authorities for this proposition; but they apply only to voluntary settlements or conveyances. Such cases are *Freeman v. Pope* (1), *Spirett v. Willows* (2), *Doe dem. Parry v. James* (3), and *Dewey v. Bayntun* (4). If the consideration of a deed is to support and maintain the grantor, and is made *bona fide*, with no intention to defeat and delay creditors, such a deed is a good one, even if the making of it has prevented creditors getting their pay. The intention of the parties, under all the circumstances, is the fact to be determined by the jury, and this is what the learned Judge left to them.

To show how little cause for complaint the plaintiff has in relation to the charge, let me call attention to what took place at the very close. The learned *Attorney-General*, who appeared for the plaintiff at the trial, asked that the jury should be told that they might infer an intention to defraud and delay creditors, from the following circumstances: Inadequacy of consideration for the transfer; the agreement itself, whereby the old man was to get support for life, was an evidence of

1890.

*Doe dem.*  
**KRITH**  
*v.*  
**CORRY.**  


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**Tuck, J.**

(1) L. R. 5 Ch. 538;  
 (2) 3 DeG. J. & S. 228.

(3) 16 East 212.  
 (4) 6 East 267.

1890.

*Doe dem.*  
**KEITH**  
*v.*  
**COREY.**  
**Tuck, J.**

fraud; the transfer of the whole property of Clark would be another evidence of fraud; and fourthly, the untrue statement as to the consideration of the deed.

In answer to this request, the learned Judge said to the jury: "That is all quite true. There is no doubt, gentlemen, that the circumstances which the counsel has mentioned are all facts to be taken into consideration by you in finding your verdict. There was the inadequacy of consideration; the transfer of the whole of the property, and the other circumstances he has mentioned. These are all matters for you to take into consideration. These are all matters certainly to show that there was a fraudulent intention with reference to it, and if you arrive at the conclusion there was fraud, taking all these circumstances into consideration, then the plaintiff would be entitled to a verdict. But taking into consideration this old man's position, also the long way Rev. Elisha Corey came to settle this matter, and the other conditions surrounding it, if you think there was no fraudulent intention of obstructing creditors, then your verdict would be for the defendant."

In reason, the plaintiff ought not to ask for anything more favorable than that charge.

I have already dealt with some of the points of misdirection, particularly those which charge that the Judge made light of Clark's indebtedness.

At the argument, the learned Judge had written notes of his charge, made by himself at the trial, and reading from them, he called in question the accuracy of the stenographer's notes. For myself, as a general rule, I would take the Judge's report of his charge, especially if he charged from written notes, in preference to the stenographer's notes. But in the present case, with my view, it makes no difference. I think that if the Judge did lead the jury to conclude that Clark's indebtedness on the 5th of April, 1882, outside of what he owed Elisha Corey, was only \$68, he lead them to a right conclusion.

The other grounds of misdirection named in the notice of motion were not urged at the argument.

In my opinion, the rule for a new trial must be refused.

SIR JOHN C. ALLEN, C. J., WETMORE, PALMER and KING, JJ., agreed that the verdict should be sustained.

FRASER, J., not having heard the argument, took no part.

*New trial refused.*

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PRESCOTT ET AL. APPELLANTS, AND MOORE, RESPONDENT.

1890.

April 26.

*Trover—Tenants in common of chattel—Sale of interest of one co-tenant under execution—Conversion—Pleading in County Court—General issue in trover.*

A. and B. owned a horse as their joint property, and while it was in B's possession it was seized by a constable under an execution issued on a judgment recovered against B. in a Justice's Court at the suit of C. The constable afterwards, by direction of C. sold the horse as the property of B.

In an action of trover by A. against C. and the constable:

*Held*—By ALLEN, C. J., PALMER and KING, JJ., that the sale by the constable only conveyed the interest of B. in the horse, and did not amount to a conversion, though the constable professed to sell the horse as the sole property of B. there being nothing to prevent A. from still exercising his right as a part owner of the horse.

Per TUCK, J., that it was a question which ought to have been left to the jury whether the horse had been sold in such a manner as to prevent A. from exercising his right in it as a joint owner.

Per ALLEN, C. J., and TUCK, J., that the judgment and execution against B. were admissible in evidence under the plea of "not guilty"—the action being in the County Court.

This was an appeal from the decision of the Judge of the York County Court, refusing a new trial in an action of trover for a horse.

It appeared by the evidence given in the County Court, that the plaintiff, William Moore and his brother, Charles G. Moore, purchased the horse as their joint property, in July, 1886, and used it as such until it was seized by the defendant, Prescott, a constable, under an execution issued out of a Justice's Court against Charles G. Moore, at the suit of one Anderson, and was sold at auction as the property of Charles G. Moore, it being at the time of the seizure and sale in his possession. The plaintiff claimed the horse as his sole property, under an alleged sale to him of his brother's interest, made several months before the seizure by Prescott; but the jury found

1890.  
 PRESCOTT  
 v.  
 MOORE.

that the alleged sale to the plaintiff was not *bona fide*, and gave a verdict for the plaintiff for half the value of the horse.

The pleas were: 1. Not guilty; and 2. No property in the plaintiff.

One of the questions on this appeal was, whether the plaintiff as a tenant in common with his brother of the horse, could maintain trover against the constable who sold the horse, and the other defendant, Anderson, who directed the sale.

The other question was whether the judgment obtained by Anderson against Charles G. Moore, and an execution issued thereon, were admissible in evidence under the plea of not guilty.

January 30, 1890. *A. J. Gregory*, in support of the appeal. The mere seizure and sale of the horse under the execution was not a conversion. At the time of the seizure, the horse was in the possession of the execution debtor, and the sheriff had a right to sell his interest in the horse, and the purchaser, as a joint owner with the plaintiff, would be entitled to all the rights of the debtor. The action of trover cannot be maintained against the defendants unless what they did amounted to a destruction of the property, or such an exclusion of the plaintiff that he was unable to exercise his rights over the joint property. See *Jacobs v. Seward* (1); *Mayhew v. Herrick* (2); *Farrar v. Beswick* (3); *Fennings v. Lord Grenville* (4). In *Smith v. White* (5) it was held that the mere sale of property was not a conversion, even by an outside wrong-doer. See, also, *Barnardiston v. Chapman* (6), and *Wiggins v. White* (7). As to the admissibility in evidence of the proceedings in the Justice's Court, see 1 Chit. Pl. 498, *Harris v. Vail* (8), and *Ashby v. Minnitt* (9). The Judge of the County Court, on the motion for the new trial, admitted that the proceedings were admissible.

*Jordan*, contra. What was done in this case amounted to a destruction of the plaintiff's rights in the horse. He was seized and sold as the sole property of Chas. G. Moore, and without in any way protecting the plaintiff's interest. It was then taken

(1) L. R. 5 H. L. 464.  
 (2) 7 C. B. 229.  
 (3) 1 M. & W. 682.

(4) 1 Taunt. 241.  
 (5) 2 P. & B. 443.  
 (6) 4 East 121.

(7) Bort. R. 97.  
 (8) 1 P. & B. 587.  
 (9) 3 A. & E. 121.

possession of by the purchaser and removed by his direction. 1890.  
See *Barton v. Williams* (1). There should be a plea of justification to allow admission in evidence of the proceedings and execution. PRESCOTT  
v.  
MOORE.

*Gregory*, in reply.

*Cur. adv. vult.*

TUCK, J. This is an appeal from the decision of the Judge of the County Court of the County of York.

The action is in trover, for the conversion of the plaintiff's mare. At the trial, the jury found a verdict for the plaintiff for one-half of the horse, and fixed the value at thirty-five dollars, and they allowed fifteen dollars for damages. They found also, 1st, that the horse was purchased by Charles and William Moore jointly, and 2nd, that the sale from Charles to William was not a *bona fide* sale. Afterwards, on motion for a new trial, the plaintiff consented to abandon the fifteen dollars allowed for damages, and the verdict stood for thirty-five dollars.

The principal question is, whether there has been a conversion of one-half the mare, of which the respondent and Charles G. Moore were tenants in common. It appears from the evidence of the defendants, and of Joseph Anderson, the purchaser at the sale, that the horse was seized and sold as the sole property of Charles G. Moore. For the appellant, it is contended that all that was really sold was Charles G. Moore's one-half interest in the mare; that the plaintiff has the same interest in the mare that he ever had, and that there has been no conversion. All of the parties reside at Queensbury, York County. The respondent lives about five miles distant from his brother Charles, who lives two miles from Joseph Anderson, who purchased the mare, and has her still in possession.

My examination of the authorities leads me to this conclusion: that one joint tenant or tenant in common of a chattel, cannot be guilty of a conversion by a sale of that chattel, unless it were sold in such a manner as to deprive his partner of his interest in it. The authorities are also to this effect;

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(1) 5 B. & A. 306.

1890.

PRESOTT

v.

MOORE.

Tuck, J.

that if the sale were made so as to change the property, as in market overt; or if the goods jointly held were destroyed, or so disposed of as to prevent the party bringing the action from following his legal rights, he would be entitled to maintain trover.

Then it is also stated that there may be dispositions of the subject matter which will amount to a conversion, if done by a stranger, that would not be so if done by a tenant in common. In *Barton v. Williams* (1), affirmed in error (2), Bayley, J., says: "A sale of the whole by one tenant in common is, with respect to the other, a wrongful conversion of his undivided part." *Farrar v. Beswick* (3) is a case not unlike the one now under consideration, although it went off largely on a question of pleading. There the jury found that James Farrar and Joshua Farrar were joint owners of the horses in question, which were sold by the sheriff under an execution against Joshua. In his second plea, the defendant justified under an execution, and alleged that the cattle, goods and chattels were the property of Joshua exclusively. Upon this plea, under the evidence, Parke, B., directed the jury to find a verdict for the plaintiff, giving the defendant leave to move to enter a nonsuit.

Afterwards in the course of the argument, Parke B. says: "I never entertained any doubt before the case of *Barton v. Williams*, that a sale by one of two tenants in common of the whole of their property, is a conversion as to the share of the other." And in giving judgment he says: "I am by no means prepared to say, that if Joshua was justly entitled to this property, the act of the sheriff would have been a conversion. As at present advised, though it is not necessary to give a conclusive opinion, I think that if the plea had stated that Joshua had a joint interest in these cattle, and that the sheriff seized and sold the whole goods to levy the execution, it would have been a good answer to this action. I have always understood, until the doubt was raised in *Barton v. Williams*, that one joint tenant or tenant in common of a chattel could not be guilty of a conversion by a sale of that chattel, unless it were sold in such a manner as to deprive his partner of his interest in it."

(1) 5 B. &amp; A. 305

(2) 3 Bing. 139.

(3) 1 M. &amp; W. 332.

In *Jacobs v. Seward* (1), the Lord Chancellor (Lord Hath-erly) reviews some of the authorities on this question. In the course of his judgment he says: "The cases in which trover would lie against a tenant in common are reducible to this. They are cases in which something has been done which has destroyed the common property; or where there has been a direct and positive exclusion of the co-tenant in common from the common property, he seeking to exercise his rights therein, and being denied the exercise of such rights." This question is discussed by this Court during the argument of *McKay v. Crocker* (2). Ritchie, J. says: "If one tenant in common puts the property in such a position that his co-tenant cannot find it, or exercise any ownership over it, or do with it what an owner has a right to do with his property, it is as much a conversion as if he had actually destroyed it." The principle which governs cases of this character seems sufficiently clear. There is difficulty sometimes in its application. In this case, the Judge of the County Court directed the jury, that if they thought the horse was purchased by Charles and William Moore jointly, he (the plaintiff) would be entitled to recover for his interest (one half), although the sale by Charles to him of his half was void. I think that this was not a sufficient direction. The Judge should have explained to the jury the law which governs the sale of property held by tenants in common, and the difference between selling the whole of such property, or only the interest of one tenant in common. And then he should have left it to the jury to say, whether the defendants or either of them had disposed of the mare, in such a manner as to prevent the plaintiff from exercising any ownership over it, or using it as he had a right to use his own property. It seems to me, that upon answers given to such questions, or the jury's views thereon, under proper instructions from the Judge, would depend the plaintiff's right to recover in this action. I am not at all prepared to say as a matter of law, that the mere fact that the respondent was owner of the mare as tenant in common with his brother Charles, prevents him from recovering in this action. All the circumstances of the case must be considered; and to do so

1890.

PRESBOTT

v.  
MOORE.

Tuck, J.

(1) L. R. 5 H. L. 474.

(2) 5 All. 20.

1890.  
PRESCOTT  
v.  
MOORE.  
Tuck, J.

rightly, there are some questions of fact, already indicated, which should be found by a jury.

At the trial, the defendant proposed to prove the proceedings, including judgment and execution issued in a case in which James D. Anderson was plaintiff and Charles Moore was defendant, in order to justify the seizure and sale of the mare. This evidence was rejected. The defendant's plea was not guilty, and notice that the mare was not the plaintiff's property as alleged. I think the learned Judge was wrong in refusing to allow the defendants to give this evidence. It was admissible under the defendants' notice. See *Harris v. Vail* (1), and *Ashby v. Minnitt* (2). Besides I think it was material. This evidence having been rejected upon the ground that judgment and execution had not been pleaded, Mr. Gregory proposed to amend his pleadings by adding a notice to that effect. This application was allowed upon terms of payment of costs up to the time of application, and that the trial should stand over until the next Court. These terms were refused by defendants' counsel and the trial proceeded. I think the terms imposed were onerous. The utmost the defendants should have been asked to pay were the costs of the trial, including a counsel fee, and not the whole costs of the action.

For all these reasons, in my opinion, the appeal should be allowed, and a new trial ordered.

KING, J. This is an appeal by the defendants in an action of trover. The appellant was a constable, and under an execution out of a Justice's Court against one Charles Moore, the respondent's brother, at the suit of one Anderson, seized and made sale and delivery of a mare found in the possession of the execution debtor. The respondent forbade the sale, claiming to own the mare. The jury found that the animal had originally been purchased by respondent and Charles Moore jointly, but that an alleged subsequent purchase by respondent of Charles Moore's interest was fraudulent and void, and a verdict was found for the respondent (the plaintiff below) for the amount in value of his one-half interest.

In Lindley on Partnership (4th ed.), 689, it is said that the

(1) 1 P. & R. 587.

(2) 3 A. & E. 121.



sheriff's duty is "to seize the whole of the partnership effects (seizable under a *fi. fa.*), or so much of them as may be requisite, and to sell the undivided share of the debtor partner therein, without reference to the state of the accounts as between him and his co-partners. The sheriff, having seized the property of the firm, proceeds to sell the interest of the judgment debtor in the chattels seized, and to assign the same to the purchaser. If the purchaser is a stranger, unconnected with the firm, he acquires for his own benefit all the judgment debtor's interest in the property, and becomes, as regards such property, tenant in common with the judgment debtor's co-partners." The law is stated to the like effect in *Helmore v. Smith* (1). Lindley, L. J., says: "The unfortunate purchaser from the sheriff has to find out what he has really had assigned to him, and that he can only do by a partnership account. \* \* That practically involves a dissolution of the whole concern." See also *Re McDonagh v. Jephson* (2).

In the case before us, the appellant, having seized the horse under the execution, appears to have sold it generally without expressing whether or not he sold the interest of the execution debtor merely. The respondent contends that this amounted to a conversion of his individual moiety.

In *Hiort v. Bott* (3), Bramwell B., says: "Mr. Bosanquet gave a good description of what constitutes a conversion when he said that it is where a man does an unauthorized act which deprives another of his property permanently or for an indefinite time."

In *Barton v. Williams* (4), Abbott, C. J., and Bayley, J., expressed the opinion that if a bailee in possession of undivided shares belonging to two persons sells the whole, it is a conversion as to the undivided part belonging to the one who may have given no express or implied authority to sell. Holroyd and Best, JJ., refrained from expressing concurrence.

In *Mayhew v. Herrick* (5), goods of a firm were seized upon execution against one of the partners for a separate debt and were sold in their entirety. The action was brought by the assignee in bankruptcy of the other partner. The declaration

1890.

PRESCOTT

v.

MOORE.

King, J.

(1) 35 Ch. D. 436.  
(2) 16 Ont. App. 107.

(3) L. R. 9 Exch. 89.  
(4) 5 B. & A. 305.

(5) 13 Jur. 1078.

1890.

PRESCOTT  
v.  
MOORE  
King, J.

contained two counts : the first count was in trover ; the second count charged that defendant knowing that one Smee was possessed of only one-hundredth undivided part of certain goods, of which one Mayhew, a bankrupt, owned the rest, wrongfully and under color of a writ against Smee, wholly sold and disposed of the entirety of the said goods to divers persons to plaintiff unknown, who then by the procurement of defendant and by color and force of said sale, eloiigned and carried them away and disposed of them to their own use, whereby they became wholly lost to plaintiff, to the damage of plaintiff as such assignee in bankruptcy. A portion of the goods to the value of £15 15/ was found to be the separate property of Mayhew, and the value of the partnership property sold was found to be £150. A verdict was entered for plaintiff for £15 15/, and leave was reserved to move to increase the verdict by £75, a moiety of the £150. The case was argued by Lush for the defendant, and by Bramwell and Willes for the plaintiff. The counsel for the plaintiff conceded that there is no distinction between the case of a sale by the sheriff and by a tenant in common, but urged that, while possibly a mere sale of the whole without delivery would not amount to a conversion by either the other partner or the sheriff, the sale and delivery of the whole was a conversion of the undivided moiety. "What answer is it," say they, "to tell him when the chattel is sold and delivered to another, that his interest still remains? He cannot exercise his common law-right to take the chattel because he cannot find it."

The Court held that the plaintiff was entitled to have a verdict on the count in trover for the £15 15/ only, such being the value of the property sold which did not belong to the partnership ; but directed a verdict to be entered upon the *second* count for £75, a moiety of the value of the property sold.

Coltman, J., said : "It is clear that the plaintiff is entitled to have a verdict on the first count for £15 15/. As regards the question whether the plaintiff can maintain trover against the sheriff for selling the partnership goods, *ex concessis*, his case does not differ from that of a joint tenant or tenant in common, irrespective of the point which is suggested on the plead-

ings. The authorities, I think, are too strong to be got over, which decide, that a mere sale by one joint tenant or tenant in common will not amount to a wrongful conversion; but it is not necessary to decide whether a sale, under some circumstances, would not amount to such a conversion. A case might arise in which a disposition of the subject of the tenancy — not an actual destruction of it — might be a conversion; as where it has been so dealt with, that the co-tenant has no remedy against the parties in possession, and cannot regain his property."

Creswell, J., said: "With reference to the question, as applicable to partnership property, whether an action of trover is maintainable by one tenant in common against another, by reason of the latter having sold their common property: it is admitted in the present case that the sheriff is in the same condition as a tenant in common. The cases shew that one tenant in common may maintain the action against his co-tenant if the common property has been destroyed, or there has been such a sale as would change the property, as in market overt. It would seem to follow that the action may also be maintained, if it can be proved to the satisfaction of a jury, that the co-tenant has so disposed of the common property as to deprive the other of all opportunity of recovering his share, or compensation for it. It would seem to follow, that such a disposition might be equivalent to a destruction. In *Barnardiston v. Chapman*, where it appeared that one tenant in common of a ship had forcibly taken it out of the possession of his companion, and secreted it from him, so that he knew not where it was carried, and changed the name of it; and it afterwards got into the hands of a third person, who sent it on a foreign voyage, where it was lost, Lord King, C. J., left it to the jury whether, under the circumstances, the destruction was not by the defendant's (the tenant in common's) means, and the jury finding in the affirmative, the Court, on motion for a new trial, approving of the Chief Justice's direction, refused to set aside the verdict. As a sale in market overt, which changes the property entirely, would amount to a destruction of the thing in common, so a sale not in market overt might have the same effect, under some circumstances; but in the

1890.

PRESCOTT

v.

MOORE.

King, J.

1890.  
PRESCOTT  
v.  
MOORE.  
King, J.

present case I do not think the sale had that effect, and the plaintiff is not entitled to a verdict upon the first count (*i. e.* the trover count) for more than £15 15/."

Williams, J., said: "I am of the same opinion. The plaintiff's rule must be absolute on the second count, but not upon the first. \* \* I still think, notwithstanding the doubts expressed in *Barton v. Williams*" (wherein Abbott, C. J., and Bayley, J., made the observations already alluded to) "that the true rule is that a joint tenant or tenant in common cannot maintain trover against his companion for the mere unauthorized sale of a chattel, their common property. \* \* With reference to the second count, I can only say whether it was sustained, not whether it is bad or good. I think the facts alleged in it were proved, and that the correct measure of damages is the value of a moiety of the partnership property, that is, £75, for which amount the plaintiff is entitled to a verdict on that count."

In *Burnell v. Hunt* (1), Patteson, J., speaking of the duty and rights of the sheriff in such cases, says: "The proper course is for the sheriff to seize the whole, and to sell the share of the execution partner; and the vendee will have to settle the matter in Chancery. The sheriff has no power to take the property out of the hands of the other partner."

In *Jacobs v. Seward* (2), the right of one tenant in common to bring trover against another was fully considered. The alleged act of conversion there was the cutting of grass and making it into hay. It was held that this was within the co-tenant's rights, subject to the liability to account to the other co-tenant for his share of the proceeds; and it was laid down that upon the other hand there is a violation of the other's rights for which the law will award damages, where anything has been done that has destroyed the common property, or where there has been a direct and positive exclusion of the co-tenant from the common property, he seeking to exercise his rights therein, and being denied the exercise of such rights.

In the judgment of Lord Hatherley, the case of *Mayhew v. Herrick* is referred to in a way that would seem to show that it was not correctly apprehended. This misapprehension was

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(1) 5 Jur. 650.

(2) L. R. 5 H. L. 464.

pointed out by Mr. *Gregory* in his argument. Thus Lord Hatherley says:

1890.

PRESCOTT

v.

MOORE.

King, J.

"There was also another case which pressed upon us—*Mayhew v. Herrick*—and that was a case where a sheriff seized the common property of partners, and sold it for the benefit of one of their number. There the peculiar circumstances made it a conversion by one tenant in common against another, and so trover would lie. The sale there was not using the partnership property in the manner in which it was proper to be used for the benefit of the tenants in common. But that was not in the least like the case of making hay out in a field, or making oil out of a whale." (As in *Fennings v. Lord Grenville*.) "As long as the tenant in common is confining his use of that property to its legitimate purpose, trover will not lie against him. But the moment he steps from the legitimate use to that which is illegitimate, as the sheriff seems to have done in that case by disposing absolutely of the common property as if the partner had been the sole owner, trover will lie."

But in *Mayhew v. Herrick*, the decision was not that trover lay under the circumstances of that case, but that it did not lie. And if the determination of the Court upon the second count is to be relied upon, that proceeded not upon the ground that the action of the sheriff in disposing absolutely of the common property made him liable, but upon the ground that, as charged in the second count, the sale was by procurement of the sheriff made to persons unknown to the plaintiff, who carried the goods away and disposed of them to their own use, whereby they became wholly lost to the plaintiff.

In the case now before us, the horse was not taken out of the possession of the plaintiff, but was taken out of the possession of the execution debtor; nor was it so disposed of as to deprive the plaintiff of all reasonable opportunity of exercising his rights over it as tenant in common. The purchaser was in the neighborhood of the plaintiff. I say nothing as to the right of the sheriff to deliver goods to the purchaser where they have been taken by him from the possession of the tenant in common other than the execution debtor; but that is not this case. This is the case of an ordinary sale, which in *Mayhew v. Herrick* was held not to amount to a conversion.

1890.

PRESCOTT  
v.  
MOORE.  
King, J.

It was not an unauthorized act, depriving the plaintiff of property permanently, or for an indefinite time. See also *Harper v. Godsell* (1).

I therefore think that the appeal should be allowed, as, upon the facts, I do not think that the plaintiff was by any act of the defendant in the seizure and sale prevented from fully exercising his rights as a tenant in common.

PALMER, J. The sole question in this case is, whether the sale by the constable, of a horse under execution against the owner of a moiety thereof, is a conversion of the other moiety which was owned by the plaintiff. No doubt what the constable intended to sell was the whole horse, including the plaintiff's interest in him, which he had no right to sell, yet the legal effect of such sale was to transfer to the purchaser only the execution debtor's interest, and this in no way hurt the other owner, the plaintiff; and as neither the constable nor the purchaser did anything with the horse that a joint owner had not the right to do, I therefore think the authorities shew that this was no conversion. It follows that the appeal ought to be allowed.

SIR JOHN C. ALLEN, C. J. This was an action of trover for a horse.

It appeared by the evidence given in the County Court that the plaintiff, William Moore, and his brother, Charles G. Moore, purchased the horse as their joint property in July, 1886, and used it as such until it was seized by the defendant, Prescott, a constable, and sold at auction as the property of Charles G. Moore, it being at the time of the seizure and sale in his possession.

The plaintiff claimed the horse as his sole property, under an alleged sale to him of his brother's interest, made several months before the seizure by Prescott; but the jury found that the alleged sale to the plaintiff was not *bona fide*, and gave a verdict for him for half the value of the horse.

One of the questions on this appeal is, whether the plaintiff, as a tenant in common with his brother of the horse, can main-

tain trover against the constable who sold the horse, and the other defendant, Anderson, who directed the sale.

The other question is, whether a judgment obtained by Anderson against Charles G. Moore, and an execution issued thereon, and under which Prescott, the constable, no doubt seized and sold the horse, was admissible in evidence under the plea of not guilty.

I will first deal with the second question, because the determination of it will materially affect the decision of the other question.

The County Court Act (Consol. Stat. cap. 51, s. 31) declares that in all actions in the County Court the defendant may plead the general issue, or some other plea in bar; and the case of *McCatherine v. Lewis* (1) decided that the provisions of chapter 37 of the Consol. Stat. relating to pleading did not apply to County Courts; and that whatever was the general issue in suits in County Courts before the passing of the Act 36 Vic., cap. 31 (of which cap. 37 of the Consol. Stat. is a re-enactment), could still be pleaded.

The question then is, whether a special plea justifying the seizure and sale of the horse under the judgment and execution against Charles G. Moore was necessary; or whether the evidence was admissible under the pleas of not guilty, and that the horse was not the plaintiff's property.

I think the judgment and execution were admissible under the pleadings. Under the old rules of pleading, the plea of not guilty, in trover, put in issue both plaintiff's property in the goods and the defendant's conversion of them. The defendant was allowed not only to contest the truth of the declaration, but (with certain exceptions not applicable here) any matter of defence which tended to show that the plaintiff had no right of action. Steph. Pl. (2nd ed.) 199.

The jury having found that the plaintiff and his brother were joint owners of the horse, the constable had the right, under the execution, to seize and sell only the interest of Charles G. Moore — an undivided moiety — but he claimed the right to sell, and did, so far as he could do so, sell the horse as the sole property of Charles G. Moore, and the plaintiff was, in

1890.

PRESCOTT

v.

MOORE.

Allen, C. J.

1890.  
 PRESCOTT  
 v.  
 MOORE.  
 Allen, C. J.

fact, deprived of his possession of the animal. The question is whether he can maintain trover.

The principle of law is settled that one tenant in common of a chattel cannot recover in trover against his companion without proving a destruction of the chattel, or something that is equivalent to it. *Fennings v. Lord Grenville* (1). The difficulty in applying that principle is, to determine what amounts to a destruction of the property. In *Mayhew v. Herrick* (2), it was decided that a mere sale of the property was not enough; though for such a disposition of the property as amounted to a destruction of it, one tenant in common of a chattel would be liable in trover to his co-tenant. In *McKay v. Crocker* (3), the plaintiff and defendant were joint owners of logs; the defendant sawed them into deals, which he mixed with other deals, his separate property, so that the plaintiff could not identify his own deals, and this was held to amount to a destruction of the common property for which the plaintiff could maintain trover. In *Jacobs v. Seward* (4), the parties each claimed to be the tenant of a piece of land owned by two ladies as tenants in common, one of whom had let the land to the plaintiff, and the other to the defendant. The defendant cut and carried away the grass growing on the land, and the plaintiff brought trover for the conversion. It was held by the Exchequer Chamber (5), and afterwards, on appeal, by the House of Lords, that the action could not be maintained. The Lord Chancellor said: "The cases in which trover would lie against a tenant in common are reducible to this: they are cases in which something has been done which has destroyed the common property, or where there has been a direct and positive exclusion of the co-tenant in common from the common property, he seeking to exercise his rights therein, and being denied the exercise of such rights. There was the case of a ship being taken possession of by one tenant in common, and sent to sea without the consent of his co-tenant. In that case it was held that the property was destroyed by the act of one tenant in common, and therefore trover would lie in respect of the co-tenant's share. But where the act done by the

(1) 1 Taunt. 241.  
 (2) 7 C. B. 229.

(3) 5 All. 30.  
 (4) L. R. 5 H. L. 464.

(5) L. R. 4 C. P. 328.



tenant in common is right in itself, and nothing is done which destroyed the benefit of the other co-tenant in common in the property, there no action will lie, because he can follow that property as long as it is in existence and not destroyed. If it is sold, another question arises under the Statute of Anne."

1890.

PRESCOTT

v.  
MOORE.

Allen, C. J.

Applying these principles to the present case, can it be said that there has been any destruction of the property, or any such carrying away of it as disabled the plaintiff from having the lawful use and benefit of it? What is there to interfere with the plaintiff's right to use the horse in the same way that he could have done when his brother was the joint owner with him? The purchaser is now the co-owner with the plaintiff, just as his brother was before the sale by the constable.

I am unable to see how the relation of tenants in common can exist between the plaintiff and the defendants in this case. Neither of the defendants purchased the horse, or the interest of Charles G. Moore in it, which is all that the constable could sell; and though they may have been wrong-doers so far as the plaintiff was concerned, in attempting to sell his interest in the horse, I am unable to understand why the rule which prohibits actions of trover between tenants in common should apply in this case. But in the case of *Mayhew v. Herrick (supra)*, where an action of trover was brought against an officer of the Palace Court, for seizing and selling partnership property under a writ of *fi. fa.* against one of the partners, Coltman, J., said that the case of a sheriff was not distinguishable from that of any other joint owner of a chattel; and, therefore, that the mere sale of a chattel by one of the joint owners was not a conversion as against the other. In *Jacobs v. Seward (supra)*, the Lord Chancellor said that the peculiar circumstances of the case of *Mayhew v. Herrick* made it a conversion of one tenant in common against another. His Lordship seemed to treat the sheriff in that case as a tenant in common with the plaintiff, for he says: "As long as the tenant in common is confining his use of that property to its legitimate purpose, trover will not lie against him; but the moment he steps from the legitimate use to that which is illegitimate, as the sheriff seems to have done in that case, by disposing absolutely of the common

1890.  
PRESOOTT  
v.  
MOORE.  
—  
Allen, C. J.  
—

property as if the one partner had been the sole owner, trover will lie."

That was the fact in the present case. The constable sold the horse as the sole property of Charles G. Moore, believing that he was so, and not knowing of, or at all events not recognizing any property in the plaintiff, who, I think, has a right to maintain trover against the defendants for the conversion, irrespective of any question of tenancy in common.

In *Barton v. Williams* (1), it was said by two members of the Court that a sale by one of two tenants in common of the whole property was a conversion as to the share of one; but the other two members of the Court did not entirely assent to that doctrine. And in *Farrar v. Beswick* (2), Parke, B., is reported to have said that he had never entertained any doubt since the case of *Barton v. Williams*, that a sale by one of the tenants in common of the whole of their property was a conversion as to the share of the other. And see the remarks of Williams, J., in *Mayhew v. Herrick* (3) on this subject.

In my opinion the decision of the Judge of the County Court was correct, and the appeal should be dismissed.

WETMORE and FRASER, JJ., took no part.

*Appeal allowed with costs.*

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(1) 5 B. & A. 395.

(2) 1 M. & W. 685.

(3) 7 C. B. 238.

*In appeal. 21 S. C. R. 1.*

CHRISTIE v. THE CITY OF PORTLAND.

1890.

April 16.

*City of Portland—Action for injury occasioned by defect in sidewalk—Misfeasance—Liability of city for—Notice of action—Whether necessary—Requirements of notice—Right of Judge to direct a juror to stand aside.*

The City of Portland is liable for injury sustained by a person in falling through a defective plank in a sidewalk constructed by the city.

In the construction of various Acts of Assembly relating to the City of Portland, and Commissioners and Surveyors of Highways: *Held*, that notice of action to the City was not necessary before commencing a suit for the injury so sustained (TUCK, J., dissenting).

A letter from the plaintiff's attorney to the City authorities, notifying them of the injury to the plaintiff in consequence of the defective sidewalk, and stating his intention to claim damages for his injuries, and requesting the City to make inquiry into the circumstances, and to pay the plaintiff such damages as he is entitled to, does not contain any of the essentials of a statutory notice of action.

Where the Act incorporating the City of Portland declared that no rate-payer of the City should be deemed incompetent as a juror in actions in which the City was a party, the presiding Judge in an action against the City has no authority to order a juror who is regularly drawn from the list to stand aside because he is a rate-payer in the City (FRASER, J., dissenting).

This was an action brought by the plaintiff against the City of Portland to recover damages for injuries sustained by him while walking on a sidewalk on the Straight Shore Road—one of the public streets of the city—by the breaking of a rotten plank, on which he stepped. He was thrown violently to the ground and was severely injured.

At the trial, which took place before His Honor Mr. Justice Fraser, at the St. John Circuit, in November, 1888, a verdict was found for the plaintiff for \$700, leave being at the same time reserved to enter a nonsuit.

June 20, 1889. *L. A. Currey* now moved for a nonsuit pursuant to the leave reserved, or, failing that, for a new trial. The first ground for a nonsuit is that no notice of action was given the defendants a month before action was brought, as required by the statutes. The Parish of Portland was incorporated by 34 Vic, cap. 11, and made and called the Town of Portland; and by sec. 84 of that Act all the rights, privileges and immunities of the commissioners of highways were

1890.  
CHRISTIE  
v.  
THE CITY OF  
PORTLAND.

transferred to the Town. Now, one of the rights, privileges or immunities then enjoyed by the commissioners was, in a case like this, a month's notice of action before any action should be commenced. Sec. 84 of 34 Vic., cap. 11, is as follows: "All the provisions of an Act made and passed in the 25th year of the reign of Her present Majesty, intituled an Act in amendment and consolidation of the laws relating to highways and of the several Acts in amendment thereof, except so far as the same are altered by or inconsistent with the terms of this Act, shall extend and apply, and are declared to be in force so far as the same are applicable within the said Town of Portland; provided, that the several powers and authorities, rights, privileges and immunities by the said Acts of Assembly vested in the General Sessions of the Peace for the City and County of St. John and commissioners and surveyors of Roads within the said Town shall be and the same are hereby vested in the Town Council, to be exercised in such manner and through such officers, agents and persons as they shall prescribe."

The following is the whole of 31 Vic., cap. 19, sec. 1. "The provisions of the first and second sections of the Revised Statutes Chapter 56, 'Of Actions against officers and recovery of Penalties,' shall extend and apply to parish officers elected under any Act relating to municipalities, or appointed by the municipal council of any county, for anything done by virtue of their office, and also shall extend and apply to commissioners of highways for anything done in the execution of any office created or the duties of which are performed under any of the provisions of an Act made and passed in the 25th year of the reign of Her Present Majesty, intituled An Act in amendment and consolidation of the laws relating to highways or of any Act or Acts in amendment thereof or in relation thereto."

Sec. 2. "And whereas it is expedient that the law should be uniform with respect to notice of action in all cases where such notice is required, that, from and after the passing of this Act, in all cases where notice of action is required, such notice shall be given one month at least before any action shall be commenced, any Act or Acts to the contrary thereof notwithstanding."

Sections 1 and 2 of chapter 56, of Revised Statutes provide:

Sec. 1. "No action shall be brought against any person for anything done by virtue of an office held under any of the provisions of this Title, unless within three months after the act committed, and upon one month's previous notice thereof in writing, and the action shall be tried in the county where the cause of action arose." Sec. 2. "The defendant in any such action may plead the general issue and give any part of this Title and the special matter in evidence. If it appear that the defendant acted under the authority of this Title, or of any regulations made by the powers conferred thereby, or that the cause of action arose in some other county, the jury shall give him a verdict."

1890.

CHRISTIE

v.

THE CITY OF  
PORTLAND.

In *Burton v. The Mayor and Corporation of Salford* (1), as in this one, certain rights of the highway officials had been transferred to the corporation, and the Court held the defendants were entitled to the three months' limitation, an immunity given the surveyors of highways by a statute passed prior to defendants' existence, but transferred to them by a subsequent Act. In fact, the transference of the rights and liabilities of commissioners and surveyors of highways to civic corporations appears to have been quite common in England. It has also been the rule that English statutes have provided for notice of action in cases such as this. As to the attorney's letter being a sufficient notice of action, it is only necessary to state that it neither assumes to be such notice, nor does it contain the chief essentials of a notice of action, such as the fact that an action will be brought, the character of the action, the time when, and the Court in which it will be brought, etc.

Proceeding to the merits of the case: the defendants are not liable for nonfeasance. The statute transferred to them only the powers and authority previously exercised by the Sessions and by the Commissioners of highways, and imposed no new duties or liabilities. The Town can only be made liable in cases in which the parish was previously liable. This was established by *Dwyer and wife v. The Town of Portland* (2), where the Court unanimously held that the town was not liable for injuries resulting from the non-repair of a street, there being no acts of misfeasance on the part of the town.

(1) 11 Q. B. D. 293.

(2) 4 P. &amp; B. 423.

1890. In no case has the town been held liable for nonfeasance. In  
 CHRISTIE *Clark v. Town of Portland* (1), the town was only held liable  
 v. for misfeasance, and the cases relied on for the decision in that  
 THE CITY OF case do not establish the proposition they were cited to support.  
 PORTLAND. In *Hill v. The City of Boston* (2), this question was fully con-  
 sidered, and all the leading authorities reviewed; and a conclu-  
 sion reached in favor of the contention here made. All the cases  
 which have been relied upon as contrary to this view of the law  
 are distinguishable, either on the ground that the powers were  
 original, the statute showed an intention to create a liability, or a  
 private advantage or emolument was derived, and not merely  
 a public duty performed for the benefit and advantage of the  
 public. Again, actionable negligence was not established.  
 The happening of an accident, or the existence of a defect, is  
 not sufficient; some clear dereliction of duty must be proved,  
 and the alleged defect be of the character of a public nuisance:  
*Boyle v. The Town of Dundas* (3); *Griffiths v. The Town of*  
*Portland* (4). The question should always be as to the general  
 performance of the duty cast upon the town (*Boyle v. Town*  
*of Dundas*), and it must be shown that the town had funds to  
 remedy the alleged defect, and negligently omitted to do so.  
*Morrill on City Negligence*, 80; *People v. Adseit* (5). Here  
 the defendants were limited by statute in their expenditure,  
 and were only allowed to expend \$4,500 a year on 44 miles of  
 streets and sidewalks, and the evidence shows that the alder-  
 men and officials, so far from neglecting their street duty,  
 exercised the greatest care and vigilance in looking after the  
 streets and keeping them in a safe condition. That they  
 diligently endeavored to do their duty is not denied, but it  
 is claimed the city is liable merely because of the exist-  
 ence of the defective plank. It is submitted this is not suffi-  
 cient, as in no case is the civic corporation an insurer, but is only  
 liable for knowingly and negligently omitting to keep the  
 streets under their control in as safe a condition as due dili-  
 gence and the means at their disposal allow of. Further, the  
 Straight Shore Road was neither recorded, nor of the requisite  
 width of fifty feet, and the defendants were prohibited by law

(1) 3 P. & B. 189.  
 (2) 122 Mass. 344.  
 (3) 25 U. C., C. P. 430.

(4) 11 Can. S. C. R. 332,  
 (5) 2 Hill 612.

from expending any money on it, and consequently could not be liable for its condition: 34 Vic., cap. 11, sec. 85; 38 Vic., cap. 92, and per Duff, J., in *Dwyer v. Town of Portland*. The expenditure of money on it could not make it a legal highway: *Perley v. Dibbles* (1); nor render the city liable in any way: Bryce on *Ultra Vires*, p. 820; *Mill v. Hawker* (2); Dillon on *Municipal Corporations*, secs. 767, 768, 381; Morrill, p. 93.

The place where the accident happened was no part of the Straight Shore Road or sidewalk, and the plank which gave way was not placed there by the city. This clearly appears from the evidence and plans. Supervisor Dunlop and Tomney prove it was neither placed there by the city nor made a part of the city's sidewalk; and even if a day laborer made repairs on it (and there is no clear evidence such was the case) without orders from the city officials, it would not render the city liable. There is evidence that the men were ordered not to interfere with it. As the city would be a trespasser if it attempted to make repairs of planks on private property, it can hardly be law that it is liable for non-repair of the same. As to the alleged repairs after the accident, the evidence is that this plank, in going down, broke the framework of the sidewalk, which alone was repaired; but what was done after the accident cannot affect the matter. As to the alleged adoption of the extra planks by the city, and invitation of the public to use them, there is no evidence of either. The city could not prevent a private person from laying planks on his own land, beside and flush with the sidewalk. In fact, this is frequently done in the city, and the corporation has no means of preventing it. This was all that was done here, and the city no more invited the public to walk on this plank than on Weir's, or any other man's platform situate beside the sidewalk. In fact, the plans show, and several witnesses state, that a person walking along would be prevented by Weir's steps from getting on this plank at all unless he was dissatisfied with a 7-foot sidewalk and turned off abruptly towards the vacant lot. A pedestrian, too, could easily see from the fences, and Weir's steps and planks running down at right angles to the planks in the sidewalk that these extra streaks of

1890.

CHRISTIE

v.  
THE CITY OF  
PORTLAND.

(1) 1 Kerr 514.

(2) L. R. 9 Exch. 309; 10 Id. 92.

1890. planks, which ended abruptly on the vacant lot, were not a  
CHRISTIE part of the regular sidewalk. To hold the defendants liable to  
THE CITY OF repair these extra planks because they were contiguous to and  
PORTLAND. level with the sidewalk would greatly embarrass and increase  
the liabilities of towns, in fact, might necessitate the erection  
of a guard or fence at the outer edge of sidewalks, a burden  
from which Portland is relieved by its charter.

There must at all events be a new trial, on the ground that  
the learned Judge erroneously ordered jurors to stand aside  
because they were ratepayers of Portland. Under the Act  
incorporating the town this was no disqualification.

*Pugsley, S. G., contra.* The first ground taken for a nonsuit  
is that no notice of action was given to the defendants a month  
before the action was brought. The contention of the defend-  
ants is, that by sec. 84 of Act 34 Vic, cap. 11, incorporating  
the City of Portland, the city has conferred upon it all the im-  
munities enjoyed by commissioners and surveyors of roads, and,  
as by Act 31 Vic. cap. 19, commissioners of highways are entitled  
to notice of action, the City of Portland was entitled to such  
notice. In answer to this contention it is submitted: That by  
section 84 of the Act 34th Vic., relied on by the defendants,  
it is provided that "all the provisions of an Act made and  
passed in the 25th year of the reign of Her present Majesty,  
entitled 'An Act in amendment and consolidation of the law  
relating to highways and of the several Acts in amendment  
thereof,' except so far as the same are altered by or incon-  
sistent with the terms of this Act, shall extend and apply, and  
are declared to be in force, so far as the same are applicable  
within the said Town of Portland, provided that the several  
powers and authorities, rights, privileges and immunities by  
the said Acts of Assembly vested in the General Sessions of  
the Peace for the City and County of St. John and Commis-  
sioners and Surveyors of Roads within the said town, shall be  
and the same are hereby vested in the Town Council, to be  
exercised in such a manner and through such officers, agents  
and persons as they shall prescribe," It is only the provisions  
of the Act 25 Vic., intituled "An Act in amendment and con-  
solidation of the laws relating to highways and of the several



Acts in amendment thereof" that are to apply to the Town of Portland. The Act 31 Vic., cap. 19, entitled "An Act to amend the law relating to notices of actions," is not an Act in amendment of the Act 25 Vic., but is an Act relating to notices of actions. Even if, by a strained construction, sec. 84 could be held to refer to the Act relating to notices of actions, the "powers, authorities, rights, privileges and immunities" there referred to are "vested in the Town Council, to be exercised in such manner and through such officers, agents and persons as they shall prescribe." The objection might be good if this action were against members of the Town Council, but how can it have any application where the action is against the corporation of the City of Portland?

1890.  
CHRISTIE  
v.  
THE CITY OF  
PORTLAND.

The is nothing in the argument on the other side that no actionable negligence was shown. The defendants constructed this sidewalk, and allowed it to become dangerous. It is a case of misfeasance: *Borough of Bathurst v. Macpherson* (1); *Clark v. Town of Portland* (2). The defect was not a latent one; on the contrary, the evidence of numerous witnesses shews that the sidewalk, which was build of plank and raised about two feet above the level of the ground, had been allowed to go to decay, so that even a cursory examination would shew that it was rotten and dangerous.

As to the objection that it was not shewn that the Straight Shore Road is recorded, or that it is of the width required by law, it is submitted that while, if the city had not taken any charge of the street, it might have been necessary to prove that it was 50 feet wide, yet, they having taken charge of it, were bound to keep it in a reasonably safe condition. Evidence that it was an open and public street, and had been such for a great many years, that public moneys had been expended upon it, and that this sidewalk had been constructed by the city, was sufficient.

Regarding the contention that the place where the accident happened was no part of the Straight Shore Road or sidewalk, and that the plank which gave way was not placed there by the city, it is submitted that the place where the accident happened was within the Straight Shore Road. There was no

(1) 4 App. Cas. 256.

(2) 3 P. & B. 189.

1890. documentary evidence as to what was the line of the street, but  
CHRISTIE there was abundant evidence that the plank which broke with  
THE CITY OF the plaintiff appeared to be a part of the sidewalk; that it  
PORTLAND. was spiked to the cross-ties upon which the remainder of the  
sidewalk rested, the cross-ties projecting beyond it; that it  
was open to the public as a part of the sidewalk, and was on a  
part where persons ordinarily travelled.

It is no ground for a new trial that the learned Judge, in the exercise of his discretion, directed some of the jurors who were ratepayers of the town, to stand aside.

*Currey*, in reply.

*Cur. adv. vult.*

The following judgments were now delivered:

TUCK, J. In this action for negligence, a verdict was given for the plaintiff for seven hundred dollars, with leave reserved to enter a nonsuit.

From the evidence it appears that in the month of July, 1888, the plaintiff, whilst walking along the sidewalk on the Straight Shore Road, in the City of Portland, stepped upon a plank which broke, and he fell through the sidewalk, and in doing so broke the large tendon in the back part of his right leg, near the heel, whereby he became lame and was laid up for some weeks.

One of the grounds upon which a nonsuit was asked, is that no notice of action was given defendants a month before action was brought, as required by the statute. Cap. 56, sec. 1, Rev. Stat. enacts that "No action shall be brought against any person for anything done by virtue of an office held under any of the provisions in this Title, unless within three months after the act committed, and upon one month's previous notice thereof in writing, and the action shall be tried in the county where the cause of action arose." The next Act in order, bearing upon this case, is 25 Vic. cap. 16, intituled "An Act in amendment and consolidation of the laws relating to Highways," which makes no provision for notice before action brought. Then there is 31 Vic. cap. 19, intituled "An Act to amend the law relating to notice of actions." Section one of

this Act, amongst other things, provides that the first and second sections of the Rev. Stat., cap. 56, "Of actions against officers, and the recovery of penalties," shall extend and apply to Commissioners of Highways for any thing done in the execution of any office created, or the duties of which are performed under any of the provisions of An Act made and passed in the twenty-fifth year of Her present Majesty, intituled "An Act in amendment and consolidation of the Laws relating to Highways," or of any Act or Acts in amendment thereof or in relation thereto. Section 2 of this Act reads as follows: "And whereas it is expedient that the law should be uniform with respect to notice of action in all cases where such notice is required: That from and after the passing of this Act, in all cases where notice of action is required such notice shall be given one month at least before any action shall be commenced, any Act or Acts to the contrary thereof notwithstanding."

1890.  
CHRISTIE  
v.  
THE CITY OF  
PORTLAND.  
Tuck, J.

The Town of Portland was incorporated by 34 Vic., cap. 11. Section 84 of this Act enacts that,—“All the provisions of an Act made and passed in the twenty-fifth year of the reign of Her present Majesty, intituled an Act in amendment and consolidation of the laws relating to Highways, and of the several Acts in amendment thereof, except so far as the same are altered by or inconsistent with the terms of this Act, shall extend and apply and are declared to be in force, so far as the same are applicable within the said Town of Portland, provided that the several powers, and authorities, rights, privileges and immunities, by the said Acts of Assembly vested in the General Sessions of the Peace for the City and County of Saint John, and Commissioners and Surveyors of Roads within the said Town, shall be and the same are hereby vested in the Town Council, to be exercised in such manner and through such officers, agents and persons as they shall prescribe.”

Sec. 104, cap. 99, Consol. Stat., is precisely the same, as to notice of action, as in section 1, cap. 56, Rev. Statutes. Cap. 120, Consol. Stat., “Promulgation and repeal of statutes,” repeals the whole of 31 Vic., cap. 19, “An Act to amend the law relating to notices of actions.” In section 22 of this chapter there is this clause: “Provided always, that where

1890. there is in 'The Consolidated Statutes' no enactment relating  
CHRISTIE to the same subject matter as the repealed Act or enactment,  
v. such repealed Act or enactment shall stand good, and be read  
THE CITY OF and construed as unrepealed, in so far as may be necessary to  
PORTLAND. support, maintain, or give effect to such unrepealed Act, or such  
Tuck, J. instrument or document."

The argument for the defendants is, that by the Act of Incorporation all the rights of commissioners of highways were transferred to the Town of Portland, afterwards made the City of Portland, which has the same rights, privileges and immunities as the commissioners and surveyors of highways had before the passing of this Act; and that one or these privileges is that the city is entitled to have, in a case like the present, one month's notice of action before any action shall be commenced. This must be correct, I think, if 31 Vic., cap. 19, is an Act in amendment of 25 Vic., cap. 16, which is an Act in amendment and consolidation of the laws relating to highways; and provided cap. 19 of 31 Vic. is not repealed, as regards the City of Portland. By secs. 83 and 84 of the Act of Incorporation, the Legislature transferred to the Town Council not only the exercise of the power and authority over the streets of the town, which had previously been exercised by the general sessions of the peace, and by the commissioners of highways under 25 Vic., cap. 16, but also all the rights, privileges and immunities which were enjoyed by such commissioners under that Act, or any amendment thereof. The language of the Act of Incorporation is explicit in this respect. In answer to this argument, the plaintiff says that the statute as to notices of actions was never incorporated into the Portland Act; that the only Acts so incorporated are those in relation to highways. His contention is that the 31 Vic., cap. 19, is not an amendment of the Highways Act; that it is a general law providing for notices of actions. Let us see how far this contention is correct. It is true that the Act is intituled "An Act to amend the law relating to notices of actions," and the second section corresponds with the title. But it is clear that the first section is in amendment of 25 Vic., cap. 16, for it extends and applies the provisions of the first and second sections of the Rev. Stat., cap. 56, as to notices of actions, to the

commissioners of highways for anything done in the execution of any office created, or the duties of which are performed under the provisions of 25 Vic., relating to highways. This section does not amend the law relating to notices of action, but extends the law relating to 25 Vic., cap. 16, and thereby amends it. The amendment to Rev. Stat., cap. 56, is made by the second section. In the opinion of the Legislature, when sec. 1 was enacted, the Act relating to highways made no provision for notice of action to officers appointed under the Act, and the intention was to amend it in that particular. It is absurd to say that sec. 1 is in any way an amendment of the law relating to notices of action. The second clause of sec. 84 of the Act of Incorporation does not limit the provisions of the first clause, which extends the laws relating to highways and the Acts in amendment thereof to the Town of Portland. By the second clause, the rights, privileges and immunities of commissioners and surveyors of roads within the town are absolutely vested in the Town Council. And when the words, "to be exercised in such manner and through such officers, agents and persons as they shall prescribe," are added, it is not meant to exclude the right of one month's notice of action before the same shall be commenced.

While 31 Vic., cap. 19, is repealed by cap. 120 Consol. Stat., the law relating to notice of action is enacted by section 104, cap. 99, Consol. Stat., and section 84 of the Act incorporating the Town of Portland is not repealed.

But it is claimed if notice of action was necessary, it was given at least a month before action was commenced. The accident to the plaintiff occurred on the 6th of July, 1888, and the writ of summons was issued on or about the 18th August. On the 9th day of July Mr. Chesley, Mayor of Portland, received the following letter, which, on the same day, was read to the Council:

"JULY 9th, 1888.

"The Council of the City of Portland:

"Gentlemen,—In behalf of Mr. J. J. Christie, of the City of Saint John, dealer in shoe findings, and as his attorney, I have to notify you that on Friday last, in consequence of a defective sidewalk in your City he fell and received severe injuries, from

1890.  
CHRISTIE  
v.  
THE CITY OF  
PORTLAND.  
Tuck, J.

1890. which he is now, and for weeks will be, confined to his bed.  
CHRISTIE As it is Mr. Christie's intention to claim damages from you for  
THE CITY OF such injuries, I give you this notice that a prompt inquiry into  
v. the circumstances may be made and such damages paid as Mr.  
PORTLAND. Christie is entitled to. I remain, etc.,  
Tuck, J.

MONT. McDONALD,  
Attorney-at-Law.

It is claimed by the plaintiff that this is a sufficient notice, according to the statute. I think it is in no sense such a notice of action as is required by the statute, and, when sent, was not intended to be so. It does not assume to be a notice of action, but a notice given in order that a prompt inquiry into the circumstances might be made, and such damages paid as Mr. Christie was entitled to. It is just such a civil lawyer's letter as any one, who knew him, would expect Mr. McDonald to write before commencing an action. A notice to be within the statute should be more explicit. It may not be necessary in the notice to set out the cause of action as fully and clearly as in a declaration, but the statute does contemplate that the defendant shall be notified that an action will be commenced against him unless he tender sufficient amends within a certain period of time. The notice must be sufficiently explicit to inform the person to whom it is sent unmistakably that unless he settle the damages sustained, he will be sued. Nothing of the kind is done here. One may suspect what Mr. Christie's intention was, but from his letter it is not necessarily to be inferred that when it was written either Mr. Christie or his attorney contemplated bringing an action if damages were not paid by the Town Council. If, however, such was his intention, he did not express it in words. In *Smith & Co. v. West Derby Local Board* (1), the beginning of the notice is: "Take notice that we (the plaintiffs) will, on the expiration of one month from this date, enter a plaint against you, the said Local Board of Health of West Derby, in the County Court of Lancashire, holden at Liverpool, for the injury and damage," etc. There the notice was attacked, for not being sufficiently explicit as to the cause of action, and was held good. I refer to the case for the purpose of showing that the notice states

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(1) 2 Q. P. D. 423.

that a plaint will be entered, the time when, the Court in which, and is signed by the plaintiffs themselves. The notice here fails in all these particulars. *Union Steamship Company of New Zealand v. Melbourne Harbor Trust Commissioners* (1), is not unlike this one as to the notice. Under the Melbourne Harbor Trust Act it is required that the notice of action shall clearly and explicitly set forth the nature of the intended action and cause thereof, and on such notice shall be endorsed the name and place of abode of the party intending to bring such action, and the name and place of business of his attorney or agent. There it was contended that a letter written by Messrs. McMeckan, Blackwood & Co., agents of the plaintiff, on the day after the accident occurred, was sufficient notice of action under the Act. Without giving the letter in full, I may say that it is addressed to the Secretary of the Harbor Commissioners; brings under his notice a very serious accident which happened to a Rortura steamer, the place where the accident occurred, and the extensive character of the damage, and claims that they must hold the commissioners responsible for the full extent of the mischief.

1890.  
CHRISTIE  
v.  
THE CITY OF  
PORTLAND.  
Tuck, J.

In delivering the judgment of the Privy Council, Sir Robert P. Collier says: "It appears to their Lordships that the Court below were right in holding that this was not a notice of action in compliance with the statute. It was clearly not intended to be. It does not give notice of any intended writ or process whatever; it does not clearly and explicitly set forth the cause or nature of the action; it does not give the name or place of business of the attorney or agent who is to bring the action. It appears to want all the necessary characteristics of a notice of action as prescribed by the statute."

Although the Melbourne Harbor Act differs from 31 Vic. as to notice of action, still the case just cited is an authority for holding that the notice of action here was not in compliance with the statute. It was not intended to be. It does not give notice of any intended writ or process whatever. For these reasons I think the defendants were entitled to a notice of action, and that none was given.

There is nothing in the second point taken, that the defect

1890.  
 CHRISTIE  
 v.  
 THE CITY OF  
 PORTLAND.  
 Tuck, J.

in the sidewalk was a latent one, and therefore the defendants are not guilty of negligence. Tomney's evidence shows that the sidewalk at this place had been bad for months, and the Town Council had intended to take it up, but contented itself with patching here and there. Tomney, who was employed by the defendants to lay and repair sidewalks, and had been so employed for nine years, says that he saw, a week or two before the accident, when he walked over the sidewalk for the purpose of making repairs, that this plank was bad, but there were as bad ones as it. He states also that he noticed it was decayed, the same way as when the plank was produced in Court. Mr. Dunlop, the City's supervisor of streets, also knew that the sidewalk was rotten at this place. How, then, can it be said that the alleged defect was a latent one, of which the Council had no knowledge? It was known to their servants who were appointed for the express purpose of looking after streets and sidewalks.

Another ground put forward for a nonsuit is, that the defendants possessed transferred powers only, and that no new duties or liabilities are imposed by the Act of Incorporation. That as the commissioners of highways were not liable before the Act was passed for negligence in not repairing sidewalks, so the City is not liable for such negligence. The argument is that the City of Portland, having only transferred powers, stands in a different position from a corporation with original powers. I think that in respect to this contention, this case cannot be distinguished from *Clark v. The Town of Portland* (1). There the Court held that if the Town assume the duty of constructing or repairing a street, it must take and leave the work which is done upon it in such a condition as not to be dangerous to any one who may use it. Here the sidewalk on the Straight Shore Road was laid by the witness Tomney, nine years before the trial, and the city had undertaken to keep it in repair ever since. The city, having assumed the duty of repairing the street, is liable for negligence, i it is left not reasonably safe for travel.

Some other points were taken for a nonsuit, but they were not pressed at the argument.

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(1) 3 P. & R. 182.



Being of opinion, for the reasons already given, that the rule must be absolute to enter a nonsuit, it is not necessary that I should discuss the questions of misdirection and improper admission of evidence.

1890.  
CHRISTIE  
v.  
THE CITY OF  
PORTLAND.  
Tuck, J.

KING, J. This is an action to recover damages for injuries sustained by plaintiff in walking upon a defective plank sidewalk on Straight Shore Road, in the City of Portland.

The plaintiff recovered \$700; and the defendants, in pursuance of leave reserved, move for a nonsuit, or, failing that, for a new trial, and that a verdict be entered for defendants on all but one count, at least, of the declaration.

One ground of the motion for nonsuit is that notice of action is required, and none was given.

The Portland Incorporation Act, 34 Vic., cap. 11, sec. 8, declares, that "all the provisions of an Act made and passed in the twenty-fifth year of the reign of Her Majesty, intituled An Act in amendment and consolidation of the laws relating to highways, and of the several Acts in amendment thereof, except so far as the same are altered by or inconsistent with the terms of this Act, shall extend and apply, and are declared to be in force, so far as the same are applicable within the Town of Portland; provided that the several powers and authorities, rights, privileges and immunities, by the said Acts of Assembly vested in the General Sessions of the Peace for the City and County of Saint John, and Commissioners and Surveyors of Roads within the said town, shall be and the same are hereby vested in the Town Council, to be exercised in such manner and through such officers, agents and persons as they shall prescribe."

By Act of 1868, cap. 19, secs. 1 and 2, one month's notice of action in writing was required to be given to commissioners of highways for anything done under the Highway Act, 25 Vic., or any Act in amendment thereof or in relation thereto.

This Act was repealed by the Consolidated Statutes. But, by cap. 120, sec. 22, it is enacted that "any reference in any unrepealed Act, or in any instrument or document to any Act or enactment hereby repealed, shall, after the Consolidated Statutes come into force, be held, as regards any subsequent

1890. transaction, matter or thing, to be a reference to the enactments in the Consolidated Statutes, relating to the same subject matter as such repealed Act or enactment; provided always that where there is in the Consolidated Statutes no enactment relating to the same subject matter as the repealed Act or enactment, such repealed Act or enactment shall stand good, and be read and construed as unrepealed so far as may be necessary to support, maintain or give effect to such unrepealed Act, or such instrument or document."

CHRISTIE  
v.  
THE CITY OF  
PORTLAND.  
King, J.

By Consol. Stat., cap. 99, sec. 104, it is provided that no action shall be brought against any person for anything done by virtue of an office held under any of the provisions of that chapter, unless within three months after the act committed, and upon one month's previous notice thereof in writing, and that the action shall be tried in the county where the cause of action arose. Commissioners of highways are officers appointed under such chapter. This may, perhaps, be deemed an enactment relating to the same subject matter as that dealt with by the repealed Act of 1848, cap. 19, secs. 1 and 2; and so be taken as supporting the words of reference in sec. 8 of the Portland Incorporation Act, 34 Vic., cap. 11. But if this is not so, then the Act of 1868, cap. 19, secs. 1 and 2 (although repealed), is to stand good, and to be read and construed as unrepealed, in so far as may be necessary to support and give effect to any provision of the Incorporation Act referring to it. So that, in either way, the provisions as to notice (if really referred to in the Incorporation Act) are saved.

Then, is the provision of the Act of 1868, requiring notice of action, one of the immunities of the commissioners of highways, vested in the Town Council by sec. 8 of the Incorporation Act?

It was contended by the *Solicitor General* that the Act of 1868 was not an Act in amendment of the Highway Acts, and therefore that the notice required by it to be given to the commissioners is not one of the transferred immunities of the commissioners of Highways. The Act is intituled "An Act to amend the law relating to notices of action;" and it was contended that the fact that notice of action is required to be given to commissioners of highways (amongst other officers)

does not make the Act an amendment to the Highway Acts. But the right to the notice is, in terms, given to the commissioners of highways in respect of "any thing done under the Highway Act or any Act in amendment thereof or in relation thereto," and I am inclined to think that it is, therefore, as to this, substantially, an enactment in amendment of the Highway Act, by giving qualified protection to the commissioners.

1890.

CHRISTIE  
v.  
THE CITY OF  
PORTLAND.  
King, J.

It is further urged that the right of the commissioners of highways to notice of action is not an immunity within the meaning of sec. 8 of the Portland Incorporation Act (34 Vic., cap. 11), inasmuch as, by that enactment, the powers, authorities, rights, privileges and immunities vested in the sessions and commissioners and surveyors of roads are vested in the Town Council, to be exercised in such manner and through such officers and persons as they shall prescribe; and it is said that this language is not applicable to the qualified protection given by the Act in question, because (as contended) this is something not capable of being exercised. "Immunity" is defined (Imperial Dict.) to be "freedom or exemption from obligation, exemption from any charge, duty, office, tax or imposition; a particular privilege, as the immunities of the clergy." The objection now being considered, if it is to prevail against the qualified immunity from action here, would in effect strike the word "immunity" from the section, because if this immunity may not be "exercised," none may.

Then, as to when a party is entitled to notice: It is sufficient that the party has a *bona fide* belief that he is exercising the powers given him by the Act, if there are facts on which this *bona fide* belief may honestly be entertained. See *Selmes v. Judge* (1); *Poulsum v. Thirst* (2); *Jolliffe v. Wallasey Local Board* (3); *Chamberlain v. King* (4). Omission to do something required by the Act may entitle the defendant to notice. *Newton v. Ellis* (5); *Wilson v. Mayor of Halifax* (6).

Then as to whether notice of action was in fact given: A letter was written by plaintiff's attorney, and sent to the

(1) L. R. 6 Q. B. 724.  
(2) L. R. 2 C. P. 449.  
(3) L. R. 9 C. P. 62.

(4) L. R. 6 C. P. 474.  
(5) 5 E. & B. 115.  
(6) L. R. 3 Exch. 114.

1890. defendants, and the action was not begun for over a month afterwards. This letter is as follows:

CHRISTIE  
v.  
THE CITY OF  
PORTLAND.  
King, J.

(His Honor here read the letter, ante p. 321.)

As to the requirements of notice of action, see *Norris v. Smith* (1); *Smith v. West Derby Local Board* (2); *Union Steamship Company of New Zealand v. Melbourne Harbor Trust Commissioners* (3). This letter is in no sense a notification of action. In *Norris v. Smith* Patteson, J., said that the notice should specify that the action will be commenced at the expiration of the limited time. Nor is the place stated with sufficient certainty. *Jacklin v. Fytche* (4); *Breeze v. Jerdein* (5). The letter is what is known as an attorney's letter, rather than a notice of a formed intention to begin action at the expiration of a certain time.

I therefore think that if a notice of action was required, none was given. But I incline to the opinion that, under the circumstances, notice of action was not absolutely necessary to the maintenance of this action. The Act in question requires that one month's notice of action in writing be given to commissioners of highways. It does not provide for notice of action being given to surveyors of highways for anything done under the Highway Acts. The surveyors of highways, not possessing this immunity under this Act, their case is not amongst the immunities vested in the Town Council under sec. 8 of the Incorporation Act.

The result of this is, that, so far as the plaintiff's claim shows a cause of action against the defendants in their capacity as commissioners of highways, it must fail for want of a notice of action. But, so far as it shows a cause of action against the defendants in their capacity as surveyors of highways, no such notice of action is necessary. The question then is as to the nature of plaintiff's claim. Under the Highway Acts certain powers are given to the commissioners of highways, and certain powers to the surveyor of highways. Without enumerating these, it may be said generally that the commissioners of highways determine upon and provide for the work, and give general order as to it to the surveyor of highways; and that the surveyor of highways is charged with the execution of the work

(1) 10 A. & E. 188  
(2) 3 C. P. D. 423.

(3) 9 App. Cas. 365.  
(4) 14 M. & W. 331

(5) 4 Q. B. 536.

and with the duty of acting in emergencies within certain limits. Here, what is complained of is a defective plank in the sidewalk; and it is charged that the street was suffered to remain out of repair, involving a charge of negligent omission; and also that the plank was improperly laid. Now, as to the last, I think there can be no doubt that the town, if liable at all, is liable by reason of negligence in its capacity as surveyor of highways. As to the omission to repair, that might in many cases involve a breach of duty in the capacity of commissioners of highways; but, having regard to the evidence, I am inclined to think that, in this case, it also involved a breach of duty in the capacity of surveyor of highways. Dunlop, the former supervisor for nine years previous to April, 1888, says that he would feel it his duty to take out a plank like the one in question, and that he always did. He also says that it would be a very negligent way for his men to build a sidewalk and not lay the planks to the centre of the cross-ties. It was his duty to superintend the laying and repairing of the sidewalk. He also says that he would feel it his duty to go around and examine for defective planks and mark them to be taken out, and that he would do this every spring. He says his directions were always to take up any defective planks and lay in good ones. Walter Brown was appointed supervisor in April, 1888 (the accident was in July, 1888). He says, that as supervisor of roads he went along this road frequently that summer, about once a week, for the purpose of looking around, seeing what holes were there, and what planks were rotten. Q. (By defendants' counsel)—Supposing you found a hole or a bad plank, what would you do? A.—Well, I would estimate what it wanted in repairs and get a man to go and do it as soon as possible. Q.—If you saw a hole, and the rest of the plank looked good, what would you do? A.—If the hole was small, we would only put a patch on it, that is a piece of board, and level it off at the ends of it; if the hole was pretty large, we would get a plank or a piece of plank, and take it out and put that new piece in; and if the hole would be very large on the end of a plank, we would cut it out up to the cross-ties and put a new piece in. This is evidence brought out by defendants' from their own witnesses. I therefore think it obvious

1890.

CHRISTIE  
v.  
THE CITY OF  
PORTLAND.  
King, J.

1890.  
CHRISTIE  
v.  
THE CITY OF  
PORTLAND.  
King, J.

that, in such slight repairs as were required here, the surveyor of highways had a duty to perform here in the keeping of the street in repairs; and that it did not require the exercise of the powers of a commissioner of highways before he could act in such case of minor repairs. I, therefore, conclude that the plaintiff may maintain this action, and recover for all he seeks to recover, without notice of action; and so that this ground of motion for nonsuit fails. Another ground was that there was no evidence of such negligence as would make defendants liable; that the alleged defect was a latent one, and that defendants had no notice of its existence. There was considerable evidence going to show that the sidewalk was, and had been for some time, in a very bad condition. It seems to have been continually breaking into holes, and was repeatedly patched. Tomney worked at this by request of the supervisor, Dunlop. Wilson, a former Alderman, says that it was defectively constructed, and that no part of the cross-tie supported the end of the plank. Other evidence tended to show that the plank rested on a cross-tie, but that that part of the tie had decayed and left the end of the plank without support. If the plank was defectively laid, no notice would be necessary. But as to knowledge of the defect, it was shown that the supervisor and aldermen of the ward were over it inspecting it. On the part of the town it was maintained that their officials had closely examined it, and found no defect; but, if the evidence of those who speak of the patent character of the defect is to be credited (as the jury appear to have done), it might well be thought that the town officials, who prove themselves to have been there inspecting, ought to have seen it. As to the contention that there was no evidence that sufficient funds were possessed by defendants to repair this street, that, if any answer at all, is not part of plaintiff's case to prove. Apart from that, it could not take much to repair a hole in a plank. The supervisor said he would repair all he saw. Then it is said that defendants have only transferred powers of the commissioners and surveyors of highways, and are not liable in a case like this. This would have no application to the charge that the sidewalk was defectively laid. Besides, the defendants are shown to have renewed this sidewalk every

seven years, that being the limit of time during which the material ordinarily lasts. So, having in effect put and maintained this structure there, it was for them to see that it did not become (as it seems to have become) a nuisance and dangerous to those lawfully using it. I can hardly see indeed how there can be (as in some cases appears to have been thought) any residuum of liability left in the inhabitants at large after the vesting of these exclusive powers in the corporation.

It was further contended that the City was not entitled to spend money on this street, as it was not fifty feet wide. I have already expressed my opinion as to this enactment in *Williams v. City of Portland* (1).

It was also argued that the place where the accident happened was no part of Straight Shore Road; but there was evidence that the defendants by their conduct led the plaintiff to his prejudice to believe that it was.

So far with regard to the motion for nonsuit, which involves matters of importance to the maintaining of the action at all.

I do not think it necessary to deal further with points arising upon the motion for new trial, inasmuch as I am sorry to say that I feel compelled to come to the conclusion that there should be a new trial upon one ground, viz., the setting aside of several jurors, regularly called, on the ground that they were ratepayers of the City of Portland. The Incorporation Act declares that in actions by or against the corporation, ratepayers shall not be disqualified from serving as jurors. This being so, I think the defendants had the right to have such jurors sworn in their turn, unless challenged or stood aside by the learned Judge for reasons recognized in the practice. The defendants' counsel claimed as a right that the jurors should be sworn and serve, unless so as above dealt with; but the learned Judge directed them to stand aside on the ground of their being ratepayers. In *Mansell v. The Queen* (2), the right of the crown in criminal cases to order jurors to stand aside was fully discussed and was maintained. But it was so maintained on grounds peculiar to the rights of the crown, or at most to the rights of either party, in criminal cases. Where a juror is physically or mentally incapacitated, or has, in the

1890.

CHRISTIE  
v.  
THE CITY OF  
PORTLAND.  
King, J.

(1) Ante p. 1.

(2) 8 E. &amp; B. 54.

1890. the opinion of the Judge, a bias, the Judge himself may doubt-  
 CHRISTIE less order him to stand aside; but I do not know that the  
 THE CITY OF power goes beyond this in civil cases. The passage from  
 v. Archbold that a party is not required to make his challenge  
 PORTLAND. till the panel is gone through with, has not, so far as I can  
 King, J. learn, ever been the practice here. In the same connection, in  
 Archbold, it is said that the party who first begins to chal-  
 lenge must go through and complete his challenge first. That-  
 too, is different from our practice.

I regret very much that in a case where the plaintiff has sustained serious injuries and had a verdict for moderate damages, upon a case where he seems to have a good cause of action, the verdict should have to be set aside on this ground. But I can see no other course open.

I therefore think that the rule should be absolute for a new trial.

PALMER, J. This is an action tried before Mr. Justice Fraser, at the Saint John circuit, and resulted in a verdict for the plaintiff. The plaintiff challenged a jurymen because he was a taxpayer in the City of Portland. The defendants' counsel insisted that this was no good ground for challenge, and that the challenge be over-ruled and that he be sworn. The learned Judge ordered him to stand aside for the present, and had the jury called from the remaining jurors, and as there was enough without this jurymen, the case was tried without him. As the Act of Assembly 34 Vic., cap. 11, clearly makes taxpayers competent jurors, it is clear that this was no good cause of challenge, and if it had been allowed, there could be no doubt but that there should be a new trial. It must not, however, be supposed that I think the Court ought to grant a new trial in any case unless the objection to the juror is distinctly made, and the Judge as distinctly rules upon the point. And in this case, if the defendants' counsel had not clearly claimed the right to have this man on the jury, and the Judge as distinctly refused, I do not think a new trial ought to be granted. It would not be enough that the Judge had merely expressed his opinion wrongly, but he ought to be made distinctly to understand that the party claimed and



insisted upon the right, and the Judge as distinctly deprived him of it. Although this much is perfectly clear, yet this case raises a most important question of practice, that is, whether a Judge ought, upon a challenge to the polls, the grounds of the challenge stated, and it in effect demurred to, order the juryman to stand aside, and have other jurymen called and sworn, and he thereby excluded from the panel, when he is a competent juryman. If this is so, it is clear that there would be little use for peremptory challenges, for either party could exclude from the jury any number of jurymen, so long as there was enough of the twenty-one remaining to make up the seven to compose the jury. If such is the law, I know that the practice of the Circuit Courts of this Province in civil suits has always been different for the last half century. The course of the practice has been, that when a challenge to a poll has been made, if the fact stated to disqualify was admitted, and the challenge demurred to, the Judge decided the matter, before another juryman was called. If the facts were traversed, and there was enough of a jury already sworn to try the issue raised by the challenge, it was immediately tried, and the juror was either declared qualified or disqualified, and not until then was another juryman called; but if there were not enough jurymen already sworn as triers, then a trial of the issue on the challenge was put off until enough jurymen were selected and sworn to try the challenge, and then the matter was disposed of as I have stated before. This practice did not at all interfere with the power of the Judge to excuse a juryman from sickness or any other cause, or standing him aside for any reason that the Court itself might think expedient, but extended only to the claims as to the right to the parties. Under this state of the practice, cap. 45 of the Consolidated Statutes and other similar Acts were passed, which, by sec. 18 of cap. 45, allowed three peremptory challenges beside the right of the parties to challenge for cause, and sec. 16 enacted as follows:

“The name of each petit juror, whenever summoned in any Court, shall be written on a separate piece of paper, and put into a box, and when a civil cause is to be tried, the clerk or some indifferent person shall draw out sufficient of the papers

1890.

CHRISTIE  
v.  
THE CITY OF  
PORTLAND.

Palmer, J.

1890.  
 CHRISTIE  
 v.  
 THE CITY OF  
 PORTLAND.  
 Palmer, J.

to complete the number required to constitute the jury; and if any do not appear, or are set aside, he shall draw until the requisite number of jurors is obtained, who, being marked in the panel and sworn, shall try the cause, but their names shall be kept apart until they are discharged, when they shall be returned to the former box, and so on, as often as necessary; if before they are discharged a cause is to be tried, the jury shall be drawn in the same manner from the residue."

I think the effect of that section is, that the persons drawn shall form the jury, except so far as they are challenged or set aside, that is, excused by the Judge or discharged by reason of the challenge or other objection. If so it would appear the right of both parties to have the jury so selected, and not allow either party, by claiming to challenge, affect or alter the order in which they are called and thereby alter the whole complexion of the jury.

Of course, if any of the jury do not appear, or are set aside, then the clerk is directed to draw from the remainder of the jurors, until the requisite number of jurors is obtained; but I think the words here "set aside" cannot mean a person challenged who is merely standing by until the challenge is disposed of, for if that was the construction of the statute, then the challenge could not be tried until the panel had been gone wholly through; but to my mind, the proper construction of it is, that he has been set aside from being a juror in that particular case, either by being excused for sickness or other cause, or has been decided to be incompetent, or has been peremptorily challenged. Any other construction would so alter the practice of the Court (that so far as I know has been uniform) with reference to which the Act no doubt was passed, that I think the Court would not be justified in doing so. Besides it would, in my opinion, introduce confusion in the practice of the selection of jurymen that would be anything but beneficial to the right administration of justice in the Circuit Courts. I therefore think that the learned Judge deprived the defendants of their right in that respect, and that, therefore, there should be a new trial.

As to the point in the case, that the City of Portland is entitled to a month's notice of the action, I cannot think there

is anything in it. If such a notice was necessary, it has been necessary to many actions brought against them ever since the Act of Incorporation of the Town of Portland was passed, some nineteen years ago; and if it is intended that the 84th Section, which is as follows:—

1890.

CHRISTIE  
v.  
THE CITY OF  
PORTLAND.

Palmer, J.  
—

“All the provisions of an Act made and passed in the twenty-fifth year of the reign of Her Majesty, intituled an Act in amendment and consolidation of the laws relating to Highways, and of the several Acts in amendment thereof, except so far as the same are altered by or inconsistent with the terms of this Act, shall extend and apply and are declared to be in force, so far as the same are applicable within the Town of Portland, provided that the several powers and authorities, rights, privileges and immunities, by the said Acts of Assembly vested in the General Sessions of the Peace for the City and County of Saint John, and commissioners and surveyors of roads within the said town, shall be and the same are hereby vested in the Town Council, to be exercised in such manner and through such officers, agents and persons as they shall prescribe”—is relied upon, it appears to me that such words can in no sense deprive a person of the right to bring an action against the Town. That right is created by the first section of the Act, which enacts that they shall be a corporation liable in law of suing and being sued. The section referred to in no way professes to interfere with or abridge such right. All it does, or professes to do, is to vest certain powers, authorities, rights and privileges and immunities in the Town Council. If it meant to cover the exemption of the corporation from being sued, one would naturally expect that it would have said so in so many words, instead of doing it by a side wind under general words. Even if it had said it applied to the corporation, but it does not; it says that these rights and whatever they are, are vested in the Town Council, which is not the corporation, but simply one of the many agents of the corporation; and not only so, but it is to be exercised in such a manner, and through such officers, agents and persons as they shall prescribe. How can that apply to another party, or something to be done by another? How could the corporation prescribe the officer to give such a notice if such could be in-

1890.  
CHRISTIE  
v.  
THE CITY OF  
PORTLAND.  
Palmer, J.

tended, and as it is not clear that whatever is vested in the Town Council by this section, are powers that they are to exercise through their officers and agents? It does appear to me that to say, that the Legislature meant that the corporation should not be sued unless they had notice of the action, because some other persons could not be so sued, is too absurd for argument. Carried to its legitimate results, then they could not be sued at all, for the Sessions could not be sued for any such cause as this.

If it had not been for the mistake in reference to the empanneling of the jury, which I have pointed out, I should think that the verdict should stand; but on that account I think there should be a new trial.

SIR JOHN C. ALLEN, C. J. The first ground for nonsuit in this case is, that the defendants were entitled to notice of action.

The determination of this question depends upon the construction to be put upon the words "privileges and immunities" in the 84th sec. of the Act 34 Vic., cap. 11, incorporating the Town of Portland.

That section declares that all the provisions of the Act 25 Vic., cap. 16, relating to highways, and of the several Acts in amendment thereof, shall extend and apply, and be in force so far as the same are applicable within the Town of Portland: "Provided that the several powers and authorities, rights, privileges and immunities by the said Act vested in the General Sessions of the Peace for the City and County of Saint John, and commissioners and surveyors of roads within the said town, shall be, and the same are, hereby vested in the Town Council, to be exercised in such manner and through such officers, agents and persons as they shall prescribe."

The Act 31 Vic. cap. 19, which was referred to in support of the contention that a notice of action was necessary in this case, declares that the first and second sections of the Revised Statutes, cap. 56—"Of actions against officers and recovery of penalties,"—shall extend and apply to parish officers elected under any Act relating to Municipalities, or appointed by the Municipal Council of any County for anything done by virtue

of their office; and shall also extend and apply to commissioners of highways for anything done in the execution of any office created, or the duties of which are performed under any of the provisions of the Act 25 Vic., cap. 16, relating to Highways, or any Act in amendment thereof, or in relation thereto.

1890.

CHRISTIE  
v.  
THE CITY OF  
PORTLAND.

Allen, C. J.

I think the provisions of this last mentioned Act are not incorporated in or applicable to the Town of Portland Act, because the Act 31 Vic., cap. 19, is not an Act relating to Highways, but to notices of action.

The words of the 84th section of 34 Vic., cap. 11, are, that all the provisions of the Act 25 Vic., cap. 16, relating to Highways, and the several Acts in amendment of it, shall apply to and be in force so far as applicable in the Town of Portland.

I do not think it can be successfully contended that the 31 Vic., cap. 19, is an Act relating to Highways. It does not profess to relate in any way to the laying out, construction, alteration or repair of Highways, which, I think, is what was intended by the 84th section of the 34 Vic., cap. 11.

I think it is also doubtful whether the word "immunities," coupled with the words which precede it—"powers, authorities, rights and privileges"—can be construed to mean notices of action.

The word "immunity," in the Imperial Dictionary, and also in the Encyclopædic Dictionary, is defined to mean freedom or exemption from any obligation, charge, duty, office or imposition. If that is a correct definition of the meaning of the word "immunity," it would be a strained construction to hold that it meant a notice of action.

There is one section of the Highway Act, 25 Vic., cap. 16—the 36th—to which the words "privileges and immunities" would be particularly applicable, and which declares that the commissioners and surveyors of roads shall be exempted from the performance of statute labor. Without that section they would be liable to perform it, as other inhabitants of the district are.

There is also another reason why I think the word "immunities" does not bear the construction contended for by the defendants, and that is, that the powers, authorities, privileges and immunities vested in the commissioners and surveyors of

1890.  
 CHRISTIE  
 v.  
 THE CITY OF  
 PORTLAND.  
 Allen, C. J.

roads by the several Acts relating to highways are "to be exercised" by the Town Council in such manner as they shall prescribe. Those words seem to me to show that the "privileges and immunities" vested in the Town Council were intended to apply either to some acts to be done by the officers of the town in the performance of their duties relating to the streets and highways, or to exempt them from the performance of some duties which otherwise they would be bound to perform; such, for instance, as the performance of statute labor, from which they are relieved by the 36th section of 25 Vic. cap. 16.

The ground for a new trial was, that the learned Judge improperly allowed one of the persons named in the jury list, and drawn by the clerk of the Court in impanneling the jury, to stand aside and not be sworn as a juror because he was a ratepayer and inhabitant of the city, though the defendants' counsel claimed the right to have the juror sworn.

The Jury Act (Consolidated Statutes, cap. 45) declares by section 2 that every male inhabitant between the age of twenty years and sixty years, being a British subject, and possessed in the county where he resides of real or personal estate, or both together, of the value of \$400, shall be qualified to serve as a grand or petit juror; and that the want of such qualifications shall be a good cause of challenge, or he may be excused on his own oath.

The 116th section of the Act incorporating the Town of Portland, 34 Vic., cap. 11, declares that no ratepayer or inhabitant of the Town shall be deemed incompetent as a juror in any action in which the Town is a party concerned.

The 16th section of the Jury Act directs that "the name of each petit juror, whenever summoned in any Court, shall be written on a separate piece of paper and put into a box, and when a civil cause is to be tried, the clerk or some indifferent person shall draw out sufficient of the papers to complete the number required to constitute the jury; and if any do not appear, or are set aside, he shall draw until the requisite number of jurors is obtained, who, being marked in the panel and sworn, shall try the cause."

I think that when a juror is so drawn, the Judge has no

authority to order him to stand aside because he may think some other juror on the list, who was neither a ratepayer or inhabitant of the town, would be more disinterested in the matter to be tried.

1890.  
CHRISTIE  
v.  
THE CITY OF  
PORTLAND.  
Allen, C. J.

The Act removes any disqualifications which might otherwise arise from being an inhabitant or ratepayer of the town; and, therefore, if a person drawn is not otherwise disqualified, he is to be sworn as one of the jurors.

The expression "set aside" in the 16th section of the Jury Act, means set aside on being challenged, or excused on his own oath, as pointed out in section 2.

WETMORE, J. I agree with the learned Chief Justice.

FRASER, J. I agree that a notice of action is not necessary. I adhere, however, to the opinion which I acted on at the trial that it is competent for the presiding Judge to order a juror to stand aside when, in his opinion it is desirable, in order to secure an impartial trial.

*New trial granted.*

1890.

MCKEAN, APPELLANT, AND JONES, RESPONDENT.

*April 16.*

*Chose in action—Assignment of—Equitable interest—Negotiable instrument—Trustes and Cestui que trust—Parties to suit for an account—Objection for want of, when taken—Appeal—Res judicata.*

C. being the holder of a policy of insurance, on which he had brought an action, assigned his interest therein to the defendant to secure him for advances made to, and liabilities incurred for C. Afterwards, C. being indebted to B., drew an order on defendant, directing him to hold the balance of the money received by him on account of the insurance, after paying the amount owing to himself, to the order of B., to whom he had assigned it. This order was presented by B. to the defendant, who accepted it by writing his name across the face of it. B. being indebted to the plaintiff, indorsed and delivered the order to him, and assigned to him all his (B.'s) interest, legal and equitable, in the balance of the insurance money. Notice of this assignment was given to the defendant, who agreed to hold the money, when received, till the rights of claimants could be determined, but afterwards declined to be bound to hold the money. The plaintiff then filed a bill for an account of the claims against the fund prior to the assignment to him, and for a decree that the balance in the hands of the defendant, after the payment of such prior claims, should be paid to him. The defendant demurred to the bill, on the ground that the assignment from C. to him, though absolute on its face, was only given as security for payment of a debt, and therefore that C. was a necessary party to the suit. The demurrer was over-ruled, and the judgment was not appealed from. Afterwards, on the hearing of the case, the defendant claimed to renew the objection that C. should have been a party to the suit, but it was rejected, and the case was heard on the questions arising upon the assignment to the plaintiff, and a decree was made in his favor.

*Held*, on appeal, 1. That even if C. was a necessary party to the suit for an account, that question having been determined on the demurrer, and not appealed from, could not be renewed on the hearing of the case.

2. That though the order drawn by C. on the defendant was not a negotiable instrument, his writing his name across the face of it amounted to his assent to the terms of it, and therefore that he held the balance of the fund for B., and that the plaintiff, as the assignee of B., had an equitable right to that balance in the defendant's hands.

3. That the plaintiff not having knowledge of any outstanding equitable rights between B. and C., would not be affected by any such equitable rights.

This was an appeal from the following judgment of His Honor Mr. Justice FRASER, sitting in Equity :

The substantial allegations in the plaintiff's bill are as follows: That one Joseph H. Chapman, being entitled to certain monies under two certain policies of insurance effected by him on his shares in the barque "Pretty Jemima," assigned the same to the defendant, McKean, by way of security, by an instrument under seal, bearing date the 28th



of February, 1880, to secure him for becoming bail for Chapman in certain suits, and also for advances before that made by the defendant to him, and also to secure the defendant for any further advances he might make, the defendant being then a partner in the firm of Carvill, McKean & Co. and Francis Carvill & Son. The policies referred to were one in the Providence Washington Insurance Company for \$5,000, and the other in the Delaware Mutual Safety Insurance Company for \$5,000. At the time of the assignment, suits had been brought and were pending in the Supreme Court of this Province by Chapman against the companies for the recovery of these insurance monies. The assignment authorized the defendant to continue the suits and collect and receive the insurance monies, and to give due acquittances and discharges therefor. That on the 20th April, 1882, Chapman, in consideration of certain money due and owing by him to the firm of Belyea & Co., of Liverpool, assigned and transferred to them his interest in the said moneys or fund, and made an order or assignment to them in the words and figures following, and delivered it to Belyea & Co.:

1880.  


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 McKEAN  
 v.  
 JONES.

“LIVERPOOL, 28th April, 1882.

“Please hold to the order of Messrs. Belyea & Co., to whom I have assigned it, any balance that remains of insurance money pro ‘Pretty Jemima,’ over and above the amount I owe or may owe to you, or to your firm of Carvill, McKean & Co. or Francis Carvill & Son, without making any further advance to me, or on my account.

“J. H. CHAPMAN.

“To GEORGE MCKEAN, Esq., Saint John.”

That the said assignment or order was in or about the month of May, 1882, presented to the defendant, who thereupon accepted it and wrote his name across the face of the said order or assignment. That Belyea & Co., after the acceptance of the assignment by the defendant, in consideration of certain monies due by the said firm of Belyea & Co. to plaintiff, indorsed and delivered said order or assignment to him, with the intention of transferring the same and the fund therein mentioned to him, and afterwards executed and delivered to plaintiff an assignment or transfer in the words and figures following:

29 RED CROSS STREET,

Liverpool, 3rd Oct., 1882.

HON. THOMAS R. JONES:

*Dear Sir:*

Having endorsed to you the order drawn by J. H. Chapman upon

1890.  
McKEAN  
v.  
JONES.

George McKean, Esq., for any balance of insurance monies in his hands when collected in our favor, and which Mr. McKean has agreed to pay, we are informed the instrument is not negotiable by indorsement, not being a Bill of Exchange; and therefore, in order to perfect your title, and to enable you to obtain the amount that may be in Mr. McKean's hands, we hereby assign and transfer our interest therein, both legal and equitable, and appoint you our attorney, in our names, but for your own use or benefit to collect the same.

We are, etc.,

BELYEA & Co.

That on the 11th February, 1885, a judgment was recovered in the Supreme Court in the name of Chapman against the said Providence Washington Insurance Company, for the sum of \$7,977.53, in respect of their policy of insurance, from which, however, the company claimed there should be deducted \$927.73, the amount of a certain promissory note and costs. That Chapman was then, and had been for ten years previously, a resident of the Province of Nova Scotia, and that he was not when the bill was filed, or for some years previously, within the jurisdiction of this Court. That defendant, as a member of the firm of Carvill, McKean & Co., was adjudicated a bankrupt by proceedings in England about the month of December, 1882, and about the month of March, 1883, made an assignment of all his property for the benefit of his creditors in New Brunswick, and that plaintiff believes the defendant has obtained his discharge from bankruptcy in England. That at the time the said judgment was recovered against the said Providence Washington Insurance Company, James Straton was the attorney on the record for the plaintiff in that action. That on the 24th February, 1885, plaintiff caused copies of the assignment by Chapman to Belyea & Co., and by the latter to plaintiff, to be served on Straton, when Straton stated that the amount of the judgment had been paid to him, and that there would be nothing coming to the plaintiff, as the amount due the estate of the late S. R. Thomson and himself and one Wm. F. Butt, would amount to \$7,500; and upon a request to furnish a copy of the assignment made by Chapman to defendant, refused to allow such assignment to be inspected, or to give a copy of it. That on the same 24th February, 1885, the plaintiff caused copies of the said assignment to be served on the defendant, who stated that he thought the judgment had not been paid, and that when the amount was received, he, the defendant, would hold it until

plaintiff had an opportunity of satisfying himself as to the correctness of prior claims, or until the plaintiff could bring a suit to have the rights of the parties determined; but on the 27th February, 1885, the defendant declined to be bound to hold the money until the rights of the parties could be determined or the claims examined. That on the same day the plaintiff telegraphed to the Providence Washington Insurance Company that he held the assignment of insurance from Chapman on "Pretty Jemima" second to the assignment to defendant, and thereby notified the company not to pay the insurance to any person but himself or defendant, and stating that he would forward copies of the assignment by first mail.

1890.  
MCKEAN  
v.  
JONES.

The bill then sets forth a number of letters which had passed between plaintiff and defendant, and between plaintiff's and defendant's solicitors respecting the said matter, and also refers to interpleader proceedings taken by the Providence Washington Insurance Company, but they are not material in arriving at the judgment I have formed, while they might have great weight upon the question of costs; but as it is my intention to reserve the matter of costs, I do not refer particularly to their contents in the judgment I am about to deliver.

The remaining allegations chiefly set forth facts upon which an injunction was claimed.

The bill prayed for an injunction, and also prayed that an account might be taken of the claims and charges on the said fund prior to the plaintiff's claims, and that such amount as might be found in the hands of the defendant, after payment of such prior claims, might be ordered to be paid to the plaintiff; with such other relief as to the Court might seem meet.

The plaintiff's bill having been demurred to, the demurrer was argued before me and overruled with costs, but with liberty to the defendant to apply to the Court for time to answer, according to the ordinary practice of the Court.

When I come to deal hereafter with the questions in the case, I shall have occasion to refer to what was in part decided by the demurrer.

The defendant having put in an answer, the substantial portions of it are the admission of the assignment by Chapman to him of the 28th February, 1880, of his policies on the barque "Pretty Jemima," by way of security and subject to the trusts mentioned in the bill. The defendant also admitted that Chapman had made and signed the order of the 28th April, 1882, in favor of Belyea & Co., but alleged that it was made to secure certain moneys then due by Chapman to

1890. Belyea & Co., and submitted it to the Court as a question of law,  
McKEAN whether such order amounted to an assignment or transfer of all the  
v. interest of Chapman in the said moneys.  
JONES.

He further admitted that somewhere about the month of May, 1882, the said order of writing was presented to him, and that he thereupon accepted it and wrote his name across the face of it. That he was informed by the plaintiff (although he does not state when he was so informed) that the said order had been indorsed, transferred and delivered by Belyea & Co. to plaintiff, with the intention of transferring the rights of Belyea & Co. under the said order to him, and that he believed that Belyea & Co. did afterwards execute and deliver to the plaintiff the assignment of the 3rd October, 1882, set out in the bill. That he had been notified by said Chapman (but does not state when) that the order which had been transferred to plaintiff was not an absolute order, but merely given to secure a sum of money at that time due, or to become due from him to Belyea & Co., which sum of money had since been satisfied by Chapman, and that Chapman had repeatedly notified him (defendant) not to pay any money to the plaintiff, and that Chapman wished to be made a party to the suit, in order that he might contest the plaintiff's claim.

He further admitted that on the 11th February, 1885, a judgment was recovered in the Supreme Court, in the name of Chapman, against the Providence Washington Insurance Company for the sum of \$7,977.53 in respect of the sum insured by their policy, but that the Providence Washington Insurance Company claimed that there should be deducted from said judgment the sum of \$927.73.

He further admitted that James Straton was the attorney on record for the plaintiff in the action when judgment was recovered, and that he believed that the plaintiff caused to be served on said Straton, on or about the 24th February, 1885, copies of the paper writings comprising the order from Chapman to Belyea & Co., and the assignment of such order to the plaintiff.

He further admitted that he had refused to give any account to the plaintiff, because Chapman had instructed him not to do so, as Belyea & Co. had been paid all the monies to secure which the order had been given to them.

It is not necessary to refer to the plaintiff's answer to the interrogatories submitted by the defendant to him, nor to any other portions of the bill, or the defendant's answer, than those I have referred to.

Replications were duly filed, and the cause came on for hearing

before me on the 20th, 21st and 22nd days of December last, when certain paragraphs of the defendant's answer, relied on by the plaintiff, were put in evidence and *viva voce* testimony taken. The further hearing was adjourned until the 25th March last, when some further *viva voce* evidence was taken and the cause was argued.

It was contended for the plaintiff, that although the evidence disclosed the fact that the order given by Chapman to Belyea & Co. was only by way of security, yet the order having been assigned by Belyea & Co. to plaintiff, and being on its face absolute, and plaintiff being a purchaser of the order for a valuable consideration, and not having any notice of the nature of the transaction, can hold it as an absolute transfer of the fund as against Chapman, and while there might be an account as between Belyea & Co. and Chapman, as against plaintiff, the latter had no such right.

It was further urged by the plaintiff, that the defendant having accepted this order which had been indorsed to the plaintiff, and which was absolute on its face, and having thereby induced Jones to alter his position, was estopped from disputing his right to receive the balance of the fund ; in fact, that Jones then had a right to look to this fund to recoup him the monies due to him from Belyea & Co.

A question having been raised on behalf of defendant, that Chapman was a necessary party to the suit, the plaintiff's counsel argued that he was not ; but if he were, Belyea & Co. ought also to be parties, and that all this went to shew that if Chapman had any claim, it was the subject of a cross-bill to be filed by him, or of an interpleader bill to be filed by defendant.

There were several contentions on the part of the defendant, which may be summed up under the following heads :

- 1st. That the order did not amount to an equitable assignment.
- 2nd. That the case proved was a different one from that set out in the bill ; the bill setting out that the assignment to Belyea & Co. was an absolute one, and that the assignment to plaintiff was absolute, whereas both were collateral.
- 3rd. That estoppel would not arise where an assignment was taken to secure an antecedent debt.
- 4th. That plaintiff, in 1882, ought to have notified Chapman that the order in favor of Belyea & Co. had been assigned to him.
- 5th. That plaintiff stood precisely in the shoes of his assignors, Belyea & Co., and could not stand in a better position than they did, and therefore would be bound by any payments which Chapman might make to Belyea & Co. on the debt, to secure which the order was given ; at all events that any payments made by Chapman to Belyea

1890.

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McKEAN  
v.  
JONES.

1890.  
McKEAN  
v.  
JONES.

& Co. before notice from plaintiff to Chapman would avail as against plaintiff, and that Chapman had paid Belyea & Co. his indebtedness before he had notice of the assignment to the plaintiff.

6th. That Chapman ought to be made a party to the suit ; and that for these reasons the bill ought to be dismissed with costs.

It would seem to me the first question to be determined is whether Chapman is a necessary party to the suit ; for, if he is, proceedings in the suit must stop until the required steps are taken to make him a party. The defendant sets up that Chapman ought to be a party, because he claims an interest in the balance of the moneys which the defendant holds in trust : in fact claims that he, and not the plaintiff, is entitled to such moneys. I think the reasonable answer to this contention is, that the plaintiff sues here as *cestui que trust* to procure accounts and the balance of the fund which he claims by assignment from Chapman ; and that it does not lie with the trustee to say to the plaintiff that somebody else claims the same balance. Before the plaintiff can succeed he must shew he is *cestui que trust* and as such entitled to the balance. If he does that the trustee cannot interpose by way of defence in this suit, and say somebody else is *cestui que trust* and entitled to the money. If Chapman has any rights, he can only secure them by the filing of a bill : he cannot, in my opinion, obtain them in this suit by the defendant intervening on his behalf. The defendant had by his acceptance of the order, admitted the right of Belyea & Co., and consequently of the plaintiff as their assignee, to the balance of the trust moneys, and had thereby, virtually agreed that, as trustee, when such moneys came to his hands, he would pay them over to the plaintiff. Can he then, when the time for paying over arrives, by any reason of the funds having come to his hands, set up as a defence that another person (Chapman) claims the fund ? Most certainly not. I think in such a case, that is, finding two persons claiming the same funds, he should have filed an interpleader bill, or possibly filed a bill to administer the trust. It appears to me, therefore, to be clear that the defendant cannot set up that Chapman is a necessary party to the suit.

Another question raised in the case is, that the order of the 28th April, 1882, and the letter of the 3rd October, 1882, did not amount to an equitable assignment of the balance of the fund.

I have already disposed of this question in the judgment which I gave upon overruling the demurrer to the bill ; for I then gave it as my opinion that the plaintiff had shewn an equitable assignment to himself of the balance of the fund ; and that judgment can be looked at, if necessary, for the reasons which led me to come to that conclusion.

I simply state here, that I am of opinion that there was a clear equitable assignment of the balance of the fund to the plaintiff.

1880.

McKEAN

v.

JONES.

What then is the position of the matter as appears from the bill and the evidence. It is this, as I understand it: Chapman being entitled to certain claims against two Insurance Companies, in respect to which actions were then pending, on the 28th February, 1880, by an instrument under seal, assigned these claims to the defendant for certain purposes, which may shortly be stated to be, to protect the defendant as his bail in certain actions which had been brought against him, and also to secure him for advances already made to Chapman, and for advances thereafter to be made by the defendant to Chapman or on his account, with full power to the defendant to continue the suits against the two insurance companies in Chapman's name, and with the right to receive the monies recovered in the suits, and to give acquittances and discharges therefor.

The suits continued to be prosecuted, but were undecided on the 28th April, 1882. Chapman at that date, being indebted to Belyea & Co., by way of securing them, gave them the order upon defendant of that date, requesting him to hold to the order of Belyea & Co. the balance of the insurance monies. This order was accepted by the defendant in May, 1882; and Belyea & Co. being indebted to the plaintiff, indorsed such accepted order to him, some time, as is stated by the plaintiff in his evidence, in the latter part of May, or first June, 1882. On the 3rd October, 1882, Belyea & Co., in a letter to the plaintiff, stated that they were informed that the instrument was not negotiable by indorsement, not being a bill of exchange; but they thereby transferred to the plaintiff all their interest in the money mentioned in the order for his, the plaintiff's own use.

Under Chapman's assignment to the defendant of 28th February, 1880, the latter had the right and full authority to receive the whole of the insurance monies; but Chapman would have a right from time to time to give directions to the defendant, as a trustee, in respect to any balance of the monies over and above such as might be required to meet the trusts created thereunder for the benefit of the defendant.

If Chapman gave a direction for consideration to hold such balance for a third party, and the defendant gave his assent to such third party to hold such balance for him, could Chapman afterwards, without the consent of such third party, revoke or alter his directions, and could the defendant refuse to fulfil his agreement by not paying over the balance to the party to whom he had assented to pay it? I think not. And is not that the very case here, the written order and the written acceptance being the most complete evidence of the direction

1890.  
McKEAN  
v.  
JONES.

of Chapman and of the assent of the defendant complying with such direction? Chapman was only *cestui que trust* as to the balance of such monies, and by the order of the 28th April, 1882, he made Belyea & Co. *cestui que trust* in his stead. The fact that the order was only given to Belyea & Co. by way of security, was not stated on its face, nor was that fact, prior to the time of the order coming into the plaintiff's hands, nor indeed until long afterwards, communicated to the defendant. The plaintiff denied that he had any knowledge of that fact at the time he took the order, and denies indeed any knowledge of the fact at any time prior to the filing of this bill.

Then what is the position of the plaintiff who, *bona fide*, for a valuable consideration, and without notice of the fact just alluded to, took from Belyea & Co. the order of the 28th April, 1882, they indorsing it and subsequently confirming the transaction, and giving further assurance by their letter to him of the 3rd October, 1882?

When the defendant accepted the order, which was absolute on its face, he undertook to hold the monies for Belyea & Co. As they were cognizant of the fact that it was only collateral, I am not prepared to say that the defendant would be absolutely bound to pay them if it could be shewn that the security had been satisfied; but when such order was passed over to the plaintiff without notice, *bona fide* and for a valuable consideration, the case is an entirely different one.

I have not overlooked, indeed I have fully considered, the authorities which were cited at the argument to shew that an assignee of a chose in action takes subject to all equities; but this case is, I think, distinguishable. Besides, there is a class of cases which shew that there may be a release of equities in such cases, and such release may be either express or by implication.

It would appear to me that when Chapman gave this order, absolute on its face, and directed the monies to be held to the order of Belyea & Co., and gave it an assignable character by using the words, "Please hold to the order of Belyea & Co.," he in effect said to any person who might (at all events without notice, *bona fide*, and for a valuable consideration) become assignee of Belyea & Co.'s right to the monies which might become payable under such order, "You have an absolute right to receive these monies." Not a right, as contended for by the defendant's counsel, which might be defeated and rendered nugatory by reason of a collateral understanding or agreement between Chapman and Belyea & Co. wholly unknown to the person who had for a valuable consideration become the purchaser of the right to the fund.



Where documents of such a description as the one in the present case can be set afloat in a mercantile community, it would be dangerous to extend to it the doctrine that the assignee takes subject to all equities. Besides, in the present case, admitting for the sake of the argument that Chapman has an equity, is not his equity against Belyea & Co. and not against Jones? Has not the plaintiff an equity also, and that too against Chapman, who gave to Belyea & Co. an order calculated to deceive a *bona fide* purchaser without notice. It would seem to me that he has: and under such circumstances the plaintiff's equity as against Chapman should prevail, leaving Chapman to deal with Belyea & Co.

I therefor agree with the contention of the plaintiff's counsel that the plaintiff can, as against Chapman, hold this order to be an absolute transfer of the fund.

But supposing this view of the case cannot be supported, how stands the matter between the defendant and the plaintiff? Can the defendant, after having entered into a written agreement, by his acceptance of the order to hold to the order of Belyea & Co. all the balance of the insurance monies, turn round and say to the plaintiff, who was the *bona fide* purchaser of this order, that the order was only given by way of collateral security and he would not account to the plaintiff for the monies? In my opinion he cannot do any such thing. Having undertaken as he did to hold these monies, he must account to the plaintiff for them. If Chapman has any claim to the fund under his agreement with Belyea & Co. (and from the evidence I am of opinion that his indebtedness to Belyea & Co. very largely exceeds anything that the plaintiff can receive under the order) it cannot, as I have already stated, be set up by the defendant as a defence to this suit.

Again, there is another view to take, assuming that the collateral nature of the transaction can be enquired into in this suit without making Chapman, and if Chapman, Belyea & Co., also parties; and I assume that it may if the plaintiff so desired. I have come to the conclusion as I have just above intimated, that from the evidence before me, (and both Belyea and Chapman were examined at the hearing), Chapman is still indebted to Belyea & Co. in an amount far beyond the amount of the judgment recovered by Chapman against the Providence Washington Insurance Company; and this is all that is necessary to establish the plaintiff's claim in this suit, upon the supposition that he is bound by the collateral nature of the transaction between Chapman and Belyea & Co.

Again, another strong point was made, as I think, by the counsel

1890.

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McKEAN  
v.  
JONES.

1890.  
McKEAN  
v.  
JONES.

for the plaintiff, and that is, that Chapman by signing such an order, and the defendant by accepting it, and its being endorsed to the plaintiff by Belyea & Co., he was thereby induced to alter his position as regards his debtors, Belyea & Co. ; and that Chapman and defendant having acted so as to induce him to take the order, are estopped from saying there is nothing due from Chapman to Belyea & Co. It is enough for me to say that I state the point, so that the plaintiff may have the benefit of whatever weight may attach to it, although I do not base my judgment upon it.

The objection taken by the counsel for the defendant, that the case proved was a different one from that set out in the bill, is, I think, not quite supported by the facts. The plaintiff, when his bill was framed, had no knowledge that the assignment to Belyea & Co. was other than an absolute assignment ; and although the evidence shewed it to be only collateral, I have already intimated my opinion that as between himself and the defendant, he had a right to treat it as absolute, or if it could not be so treated, then the defendant's acceptance was an agreement on his part to hold the balance of the fund to the order of Belyea & Co. ; and they, by their assignment to the plaintiff, the last of May or the 1st June, 1882, confirmed by their letter of the 3rd October, assigned to the plaintiff : and thus the defendant was bound to hold the balance of the fund for the plaintiff, and the statement therefore becomes immaterial ; but if in any way material, the plaintiff would be allowed leave to amend his bill and place his case on the record to meet the objection. It would not be ground for dismissing the bill.

As to the other portion of this objection, viz. : That the plaintiff had set forth in the bill that the assignment to himself was absolute. I cannot find that the plaintiff has stated in his bill other than the facts in regard to the assignment to himself ; that is, the order and letter, and I am of opinion it was not necessary for him to state that the assignment to himself was only collateral, as no right of any person is affected by reason of the transfer from Belyea & Co. to him ; being collateral, however, if counsel for plaintiff think it material, which I do not, the bill can be amended in that particular.

I think I may dispose of all the other objections taken by the defendant's counsel which I have not already noticed, by stating that, I do not think the plaintiff was bound to give Chapman notice that the order had been assigned to him. If the plaintiff had been informed of the nature of the transaction between Chapman and Belyea & Co. when he took the order, there might have been some shew of reason why he should give Chapman notice, but taking an

order absolute on its face, so far as relates to Chapman, there is no pretence in my opinion for urging that there was any circumstance, however slight, which should have led plaintiff to notify Chapman that he held the order.

1890.

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McKEAN  
v.  
JONES.

If, however, the plaintiff was bound to give notice to Chapman, and for want of it is bound by any payments Chapman might have made Belyea & Co. after the date of the order, not knowing that the plaintiff was the holder of it, Chapman has not been injured; for as I have already stated, the evidence abundantly satisfies me that the amount still remaining due by Chapman to Belyea & Co. far exceeds any balance of the trust fund.

There were some portions of the evidence that it was my intention to have referred to; such as some of the correspondence between the parties, and between the solicitors, and the conversation between Mr. McLean, one of the solicitors for the plaintiff, and the defendant, some of which are very important, particularly that defendant when spoken to in February, 1885, by McKean, on behalf of plaintiff, appeared to recognize plaintiff as the assignee of the order, and in referring to the claims upon the fund he never mentioned Chapman as having a claim, but spoke of the Thomson and Butt claims, and Mr. Straton's costs: but as I do not desire to delay the judgment, I will at an early date collate such evidence and append it to this judgment, to be taken and read as part thereof.

At the argument it was conceded by the counsel for the plaintiff that there was no objection to the deduction from the trust fund of the claims of the defendant, of the executors of the late Samuel R. Thomson, and of one Butt; and although the amounts were not stated nor any evidence offered in respect to them, counsel both for plaintiff and defendant appeared to be agreed as to what they were.

This leaves me then but to say that I think the plaintiff is entitled to an account, according to the prayer of his bill, of the claims and charges on the said fund prior to the claim of the plaintiff; and that such amount of the fund as may be found in the hands of the defendant after payment of such prior claims, be paid by the defendant to the plaintiff; and the decree will be accordingly.

As part of the decree, a reference will go to one of the Referees of the Court to ascertain and inquire —

1st. The amount of trust funds received by the defendant, or which, but for his neglect or default, ought to have been received by him under the trust deed of the 28th February, 1880.

2nd. When such trust funds, if received, were received, and if not,

1890.  
McKEAN  
v.  
JONES.

or any part thereof not received, when the same were due and payable, and might have been received by the defendant had he used reasonable diligence in collecting the same.

3rd. If the defendant has received any trust funds, where the same have been deposited, and what interest has been received for the same, or if used by the defendant, or with his consent, what interest should be allowed for the same.

4th. An account of the claims and charges on the said trust fund, prior to the claim of the plaintiff, the claim of the plaintiff arising at the date of the acceptance by the defendant (sometime in May, 1882) of the order of the 28th February, 1882, set out in the second paragraph of the plaintiff's bill.

And I do further direct, that the injunction order in this cause be continued until further order of the Court be made in reference thereto. And I reserve further directions, and the question of costs until after the Referee shall have made his report.

When I delivered judgment on the hearing in this case I stated that I reserved the right to supplement what I had written by a reference to some portions of the evidence, and this I now do.

The plaintiff on his examination stated that he never received any notice, nor did he, up to the time of the commencement of this suit, hear that Chapman had a claim in any way to the fund, and he most positively asserts that neither the defendant nor Straton, his solicitor, ever notified him that Chapman had made even any claim to the fund, nor was he, up to that time, aware that Chapman disputed Belyea's account.

The plaintiff further stated in his evidence, that while he had heard of the prior claim of the Thomson estate, he was not, until after June, 1885, informed that Chapman claimed not to owe Belyea:

Mr. McLean, one of the solicitors for the plaintiff, in his evidence refers to conversations he had with the defendant and with Mr. Straton in February, 1885. In the conversations with the defendant, Mr. McLean states that while certain claims against the fund were mentioned, viz., the Butt and Thomson estate claims, and the claim of Mr. Straton for costs, not one word was then said by the defendant about any claim of Chapman. Mr. McLean states that to the best of his recollection, the first occasion on which it was alleged that Chapman had a claim, was when the application was made to dissolve the injunction, when Mr. Straton mentioned in a conversational way that Chapman did not owe Belyea & Co. anything.

The defendant in his evidence states on the contrary that he did, in

February, 1885, at the first interview with Mr. McLean, inform him that Chapman had told him (McKean) that he was not due anything to Belyea & Co. In addition to that, the defendant says he told McLean that Butt had a claim on the fund, and the Thomson estate, and also the firms of Carvill & McKean and Francis Carvill & Son, and that he (defendant) had understood from Chapman that Belyea & Co. had no claim upon the fund.

On cross-examination, the defendant stated that it was in 1883 or 1884, that Chapman told him that he had paid off Belyea & Co. and was not indebted to them.

Chapman gave an account of his dealings with Belyea & Co., and claimed that not only had he paid them all his indebtedness, but that they owed him a thousand pounds.

He further stated that he demanded the order back from the Belyeas, and that old Mr. Belyea told him that the plaintiff had it, and he would write him to give it up to him (Chapman), and that this was sometime during the year 1883. That he afterwards saw the plaintiff in his own office in St. John, and told him that Belyea had told him in Liverpool to call upon him (Jones) and get the order, to which Jones replied that he had not heard from Belyea to that effect, but he would write them and let him know about it. However, he (Chapman) never got the order.

Chapman also stated that he had directed the defendant not to pay Jones a cent. Also, that although he claimed that the Belyeas had been paid off, he and they had never had a settlement.

Mr. George A. Belyea, in his evidence, states what took place when Chapman gave the order upon the defendant, and says Chapman never claimed that he had paid off his indebtedness to Belyea & Co.; that it was absolutely untrue that they were indebted to him, but on the contrary, that Chapman was indebted to them all the way through; and he stated the amount to be £3577 6 5 stg., exclusive of interest.

It appears to me, from the evidence, that the alleged claim of Chapman was not brought to the notice of the plaintiff or of Mr. McLean, until plaintiff had either instituted, or was about to institute this suit, and that such alleged claim was not put forward in the first instance as one of the claims which was entitled to priority in payment, to the claim of the plaintiff under the order; those being confined to the Butt claim, that of the Thomson estate, and the claim of Mr. Straton for costs.

Mr. McLean does not say in his evidence that the claims of Carvill,

1890.  
McKEAN  
v.  
JONES.

1890.

McKEAN  
v.  
JONES.

McKean & Co. and Francis Carvill & Son were mentioned by defendant to him, but the defendant says he did mention them. This may be accounted for from the fact that the claims of Carvill, McKean & Co. and Francis Carvill & Son appear on the face of the order, and by its express terms are claims in priority to that of the plaintiff; while the Butt and other claims I have named, are of a different character, and do not appear on the face of the order, and Mr. McLean's enquiry would appear to be directed so as to ascertain what the claims, other than those mentioned in the order, really were.

Again, it does seem strange that the defendant, if he thought Chapman was entitled to the balance, should have named to McLean several claims upon the fund prior to the claim of the defendant.

If defendant, from conversation with Chapman in 1883 or 1884, knew that the latter then claimed that Belyea & Co. had been paid off by him, and that the plaintiff had no claim, why did he profess to talk to McLean about the claims prior to plaintiff's, upon the fund?

The not unreasonable inference to be drawn from his conversation with McLean is, that he considered that plaintiff had a claim, which the plaintiff could not have if Chapman was entitled to the balance; and this would go far to support Mr. McLean's evidence that nothing was said by defendant in February, 1885, about Chapman having any claim.

I thought, upon consideration of the whole of the evidence, that the account of matters given by the plaintiff and Mr. McLean looked the most reasonable; and therefore whatever effect that would have, that the plaintiff's case should have the benefit of my view in this respect.

The judgment delivered by His Honor Mr. Justice Fraser on the demurrer and referred to above (ante p. 346) was as follows:

It was contended on the part of the defendant at the argument of the demurrer, that the paper writing held by the plaintiff did not amount to an equitable assignment; and that the assignment of the policies to the defendant was an absolute assignment, and the assignor could not after that do anything but make a disposition of the money after it was collected; he could not assign, because an assignment must be of something in esse, and that the order in favor of Belyea & Co. was a mere order to pay money, and would not be available unless it were shown that the money came into the hands of the defendant. It was also urged that as the assignment to the defendant was of the two

policies, and he was authorised to continue the suits to judgment, the plaintiff had no right to step in until judgment was reached in the action on the other policy, unless, at all events, he offered to pay the defendant all his claims.

1890.  
McKEAN  
v.  
JONES.

This raises the question, what is the effect of the order or paper given by Chapman to Belyea & Co.? Did it, or did it not, amount to an equitable assignment of Chapman's interest in the insurance monies? I think that the assignment made by Chapman to the defendant was only by way of security. Chapman could at any time, by putting in new bail in the suits in which the defendant became bail, and thus relieving McKean from his liability as bail, and by paying to him the monies otherwise secured by the assignment, have claimed a re-assignment or release from McKean of any interest transferred to him in the policies. If so, he, Chapman, had, notwithstanding the assignment, an interest left in himself; in other words, an equity of redemption, and this he might assign to any other person.

The paper under date the 28th April, 1882, and signed by Chapman, directed the defendant to hold to the order of Messrs. Belyea & Co. any balance that remained of the insurance monies pro "*Pretty Jemima*," over and above the amounts secured by the assignment to the defendant. That of itself—these words alone—I think, amount to an assignment. But the language of the paper goes further and makes a request upon defendant to hold to the order of Messrs. Belyea & Co., adding, to whom I have assigned it, any balance, &c. Chapman thus admits in words, on the face of the paper, that he has assigned to Belyea & Co. the balance of these insurance monies. What stronger language could be required to make an assignment, I can scarcely conceive. When informed of and shewn this paper, the defendant wrote his name across it, and thus in the very strongest possible way gave his assent to the directions of his assignor, Chapman, and agreed to hold the balance of the insurance monies mentioned in the paper for Belyea & Co. Further, it is stated in the eleventh paragraph of the bill that the defendant, on the 24th February, 1885, when handed copies of the assignment by Chapman to Belyea & Co. and from Belyea & Co. to the plaintiff, said he thought the amount of

1890.  
McKEAN  
v.  
JONES.

the judgment against the Providence Washington Insurance Company had not been paid, but that when it was received he would hold the amount thereof until the plaintiff had an opportunity of satisfying himself as to the correctness of prior claims, or until the plaintiff could bring a suit to have the rights of the parties determined; although on the 27th February, 1885, he declined to become bound by his promise to hold the money until a suit could be brought or the claims examined. There was thus a clear recognition on the part of the defendant, of the plaintiff's right to receive any balance of the insurance monies, if there was any balance over and above the claims thereto in preference to the claim of the plaintiff. It was urged on the part of the defendant, that even if the plaintiff had an equitable assignment of the fund, to make it complete, notice of it should be given to the debtor in this cause, the Providence Washington Insurance Company. I do not see, as between the parties to this suit, why any such notice was necessary; but in fact such notice was given, for in the tenth paragraph of the bill it is stated that on the 24th February, 1885, the plaintiff telegraphed to the Company as follows:

"I hold assignment of insurance from Chapman on 'Pretty Jemima,' second to assignment to McKean; hereby notify you not to pay insurance to any person but me or McKean. Will forward copies assignment first mail." And in consequence of this notification from the plaintiff, the company filed their bill of interpleader against Chapman, McKean, Straton, Butt and the plaintiff.

Again, it was contended that the plaintiff had no right to institute this suit without offering to pay the defendant's claims: but I cannot see any force in this. The plaintiff had a right to receive a statement from the defendant of the amount he claimed under his assignment from Chapman, and although it is stated in the bill that Mr. Justice King, in disposing of the interpleader proceedings, recommended the defendant to furnish such statement, and although the plaintiff repeatedly applied to the defendant for it, no statement was ever furnished to him.

Another objection to the plaintiff's bill was, that as the assignment by Chapman to the defendant included the two policies, and judgment had only been recovered on one of



them, the defendant had a right to say he wished the other to go on, and that until that suit was determined the plaintiff could not call for a discovery. Being of opinion that the plaintiff is the equitable assignee of the monies arising from both policies, subject of course to the priority of the defendant, I think he had a right at any time to ask the defendant for a statement of his claims under the assignment to him of the 28th February, 1880. Among the priorities is stated to be the claim of Butt; but I do not notice it, because at the argument it was conceded that to whatever extent it existed, it would not make any difference in determining the question of the present demurrer.

Then, as to the ground of demurrer, that Chapman is a necessary party to the suit: it would appear by the allegations in the 2nd paragraph of the bill, that in consideration of certain money due and owing by him to Belyea & Co., he assigned and transferred to them the balance of the insurance monies over and above the defendant's claim thereto. This assignment is not stated to be by way of security, but appears to be an absolute assignment, in consideration of an indebtedness from Chapman to Belyea. In the absence of any statement to shew that Chapman had made this assignment to Belyea & Co. by way of security, I see nothing which would require the plaintiff to make Chapman a party to the suit.

I am therefore of opinion, that the demurrer to the plaintiff's bill must be over-ruled with costs; but with liberty to the defendant to apply to the Court for time to answer, according to the ordinary practice in that respect.

October 9, 11, 1889. *Blair, A. G.*, in support of the appeal. Under the evidence in this case, the order, although absolute on its face, was given and received as a collateral security for money Chapman then owed, or might thereafter owe Belyea & Co., and that being so, the order was subject to any existing equities. The writing of the name across the face of the order by McKean does not import a promise to pay, and is not a contract enforceable against him irrespective of the equities. It is true McKean speaks of having accepted the order; but he did not say he would pay the amount. His use of the word

1880.

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McKEAN  
v.  
JONES.

1890.  
McKEAN  
v.  
JONES.

"accepted" as describing his act, does not impart to the act any different meaning than it would bear if he had written his name, and said nothing. As a non-negotiable paper, not being capable of acceptance as a bill of exchange, with the incidents which attach to such an acceptance, the Court must treat the act as nothing more than an acknowledgment that he had received notice of it. There was clearly not an express promise to pay; and an implied promise will not arise from the act. Making a non-negotiable instrument payable to order will not change its character, as it is not competent to a party to create a transferable right of action on a contract, by his own act. The position of Belyea & Co. was nothing more, therefore, than that of an equitable assignee of Chapman's interest in the fund, and the assignment to Jones being admittedly also by way of security, is only an equitable assignment of Belyea & Co.'s equitable interest in the fund, and is subject to all the equities which would attach to the order if still in the hands of Belyea & Co. The only right which Jones would thereby acquire would be to file a bill against McKean claiming an equitable assignment of the chose in action, and having made Chapman a party, and, perhaps, Belyea & Co., or their assignees in bankruptcy as well, ask for an account and payment out of the balance of the fund of the amount still due by Chapman to Belyea & Co. 2 *White and Tudor Leading Cases*, 849, 850, 879, 880; *Mangles v. Dixon* (1); *Stocks v. Dobson* (2); *In re Tichener* (3); *Norrish v. Marshall* (4). Even the assignee of a bond must take it subject to all equities, and yet a bond is a positive and absolute contract: *Coles v. Jones* (5); *Turton v. Benson* (6). If this view of the relative rights and position of the parties is correct, it follows that Chapman should have been a party to the suit. It is the duty of the Court to make a complete decree, and have all parties before it. *Story's Eq. Jurisp.*, secs. 186, 193, 199, 218 and 219; *Palk v. Clinton* (7); *Hobart v. Abbot* (8); *Calverley v. Phelp* (9); *McGown v. Yerks* (10); *Adams v. St. Ledger* (11); *Court v. Jeffery* (12); *Wood v. Williams* (13); *Osbourn v. Fallows* (14); *Malin v. Malin* (15); *Fish v. Howland* (16),

(1) 8 H. L. Cas. 702.  
(2) 4 DeG., M. & G. 11.  
(3) 35 Beav. 317.  
(4) 5 Madd. 475.  
(5) 2 Vern. 692.  
(6) 2 Vern. 764.

(7) 12 Ves. 52.  
(8) 2 Fr. Wma. 643.  
(9) 6 Madd. 232.  
(10) 6 Johns. 460.  
(11) 1 B. & B. 181.  
(12) 1 Sim. & S. 106.

(13) 4 Madd. 186.  
(14) 1 Russ. & M. 741.  
(15) 2 Johns. 238.  
(16) 1 Paige 20.

That a cross bill is not necessary, see *Ayliffe v. Murray* (1), and *Jones v. Farrell* (2). That an interpleader bill is not a proper remedy, appears by Daniel's Ch. Pr. 1560, 1561 and 1567: *Bedell v. Hoffman* (3). As to the effect of the judgment on the demurrer to the bill: Although that judgment decided that Chapman was not a necessary party, and it was not appealed from, the plaintiff is not precluded from raising the question on the hearing. It is the duty of the Court to see, before it makes a decree, that it has all the proper parties before it; and although the parties had never raised the question, the Court will do so of its own motion when it appears parties are absent who should be before the Court. Besides, this is an objection that may be taken for the first time at the hearing even of an appeal. 1 Dan. Ch. Pr. 287, 292. [TUCK, J., refers to *In re Central Bank of Canada* (4)].

1890.  


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 MCKEAN.  
 v.  
 JONES.

*Weldon, Q. C.*, and *E. McLeod, Q. C.*, contra. For the purposes of the assignment, there is no necessity for the notice to the debtor or trustee. The object of the notice is to prevent equities arising between the debtor or trustee, and the original creditor or assignor. The assignment is complete without the notice. Lewin on Trusts, 721. Here, McKean became clothed with a trust by the assignment from Chapman in favor of himself and other parties, and subsequently a resulting trust to himself. This resulting trust could be assigned, and so, in fact, Chapman does assign it to Belyea & Co., who in turn assigned it to Jones. These transfers, as they appear and are set out in the bill, make an absolute and valid assignment of the interest of Chapman, as they are absolute; and when McKean received notice thereof he became a trustee for Jones. Now, it appears by the statement in the bill, sustained by the acceptance of the order made by McKean by writing his name across it when presented to him, that he received notice shortly after its making. McKean then became a trustee for Jones of the resulting trust, and free from all liability to Chapman; and had he accounted with and paid Jones, such accounting and payment would be a good answer to any claim of Chap-

(1) 2 Atk. 59.  
 (2) 1 DeG. & J. 208.

(3) 2 Paige 199.  
 (4) 9 Can. L. Times, 305.

1890.  
McKEAN  
v.  
JONES.

man. But it is contended that the evidence shews it was only given as a collateral security to Belyea & Co. Even assuming this, McKean cannot raise that objection. Whatever equities might arise between Chapman and the Belyeas, or Chapman and Jones, or with what trust the monies received by Jones were clothed, McKean has nothing to do with them, nor does it raise any right in him to have these investigated in a suit against him for an account. Either McKean should have filed an interpleader suit; or Chapman, if he claimed the monies, should have filed a bill to restrain the monies being paid over. *Prima facie*, the assignment is absolute, at any rate on its face it purports to be. *Phipps v. Lovegrove* (1); *In re Agra and Masterman's Bank* (2); *Donaldson v. Donaldson* (3).

It is also contended that Chapman was a necessary party to the suit. Jones seeks by his bill that an account may be taken of the prior claims and charges, and that the amount that may be found in the hands of McKean after payment of such prior claims be ordered to be paid to him. There is nothing in the bill to shew that Chapman was a necessary party. The allegations admitted by the demurrer shew an absolute assignment, and a divesting of all interest of Chapman in the funds in the hands of McKean. It is contended, however, that the evidence shews it was not an absolute assignment, but only given as collateral security to Belyea & Co. to secure the amount of indebtedness to them. Even assuming that to be the case, the assignment is absolute on its face. So worded that Chapman knew it would be transferred, being payable to order, and Jones took it in good faith on payment of the amount due him, and refrained from proving his debt against Belyea & Co. in bankruptcy. McKean had, by writing his name on the face of the order, recognized the transfer, and it is submitted then the relation of trustee and *cestui que trust* between McKean and Chapman was entirely put an end to. Having ceased, Chapman could not restore that relation by any notice, or thereby destroy the rights of Jones. If McKean's contention is correct, not only should Chapman be added as a party, but also Belyea & Co., and then the decree would not only be to take an account as between McKean and Jones, but also as between

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(1) L. R. 16 Eq. 80.

(2) L. R. 2 Ch. 391.

(3) Kay 711.

Chapman and Belyea, and the latter and Chapman with Jones. See Consol. Stat., secs. 30 and 51. 1 Smith's Ch. Pr. 203.

1890.  
MCKEAN  
v.  
JONES.

As to all questions of fact: the Judge who had all the parties before him and heard the evidence, decided them all in favor of Jones, and his finding will not be interfered with: *Jones v. Calkin* (1).

*Blair, A. G., in reply.*

*Cur. adv. vult.*

The following judgments were now delivered:

TUCK, J. This is an appeal from a judgment of Mr. Justice Fraser, sitting in Equity.

Joseph H. Chapman, being the holder of two policies of insurance upon which he had brought suits in the Supreme Court of New Brunswick, assigned the policies and the several sums of money insured thereby to the defendant, to secure him as bail, and for moneys which he had advanced.

On the 28th day of April, 1882, Chapman made the following order directed to the defendant: "Please hold to the order of Messrs. Belyea & Co., to whom I have assigned it, any balance that remains of insurance money per 'Pretty Jemima,' over the amount I owe or may owe to you or to your firm of Carvill, McKean & Co., or Francis Carvill & Son, without making any further advances to me or on my account." In May, 1882, this order was accepted by the defendant, by writing his name across its face. After the acceptance by McKean, Messrs. Belyea & Co., in consideration of moneys which they owed the plaintiff, indorsed and delivered this order to him, with the intention of transferring it and the moneys therein to the plaintiff, and on the 3rd day of October, 1882, executed and delivered to him the following assignment or transfer:

(His Honor here read the assignment, as stated on page 341).

On opening the argument, the Attorney-General stated that one of the questions arising is, What is the effect of the acceptance on the order? That, on the one side, it is claimed that the defendant agreed to pay the money in accordance

1890.

McKEAN

v.

JONES.

Tuck, J.

with the terms of the order; and on the other, that it was only an admission by McKean that the order had been presented to him. No such contention was made in the Court below, or if there was, it was not insisted upon. But whether or not, the defendant made no such claim, and all the evidence shews conclusively that when he accepted the order, he agreed to comply with the terms.

The plaintiff claims that he has an equitable interest in the insurance moneys received and remaining in the defendant's hands, after the other charges upon the fund mentioned in the order had been satisfied; and that the instrument in writing, drawn by Chapman on the defendant, being made payable to the order of Belyea & Co., it was meant to be transferred by endorsement, so as to pass a good title to a *bona fide* endorsee for value, and not to be subject to any equities between Chapman and Belyea & Co.

For the appellant, the argument is that the order given to Belyea & Co. by Chapman was only as collateral security for what he owed them; that the assignment given by Belyea & Co. to Jones was as security; and that Chapman's order, although absolute on its face, was subject to an equity of redemption, by which the plaintiff was bound to the same extent as Belyea & Co. This being so, the contention is that Chapman had a right to settle with Belyea & Co. for what he owed them, and if he did pay them, the plaintiff would have no right to the fund remaining in the hands of the defendant; that in order to determine the state of accounts between Belyea & Co. and Chapman, he should have been made a party to the suit, and that the bill should be dismissed for want of parties. Unless the defendant has the right, in the present condition of this case, to urge that Chapman should be made a party to the suit, it seems to me his appeal must fail.

If only the bald question had to be determined, I am of opinion that Chapman is not a necessary party. By the assignment to him in February, 1880, George McKean became the trustee of this fund, in which Chapman had an equitable interest. In April, 1882, he made an assignment of this interest to Belyea & Co., which he was entitled to do. As it is said

in *Donaldson v. Donaldson*, (1); Chapman was the donor of the fund and McKean the donee. When, therefore, Chapman assigned all his interest in the fund to Belyea & Co., it was no part of McKean's duty to inquire what were the relations between Chapman and Belyea & Co. By the donor's own act the title of Belyea & Co. to the fund was complete, and whatever title they received was transferred by them to the plaintiff, and to enforce his right it is not necessary to make the donor of the fund a party to the suit. If Chapman had an equitable right to any portion of this fund, he should have filed a bill himself in order to enforce his right.

The general rule, that all persons having an interest in the equity of redemption must be made parties to a bill of foreclosure, has no application to this case, for in my opinion Jones became the absolute owner of Chapman's equitable interest in the fund of which McKean was the trustee.

The cases cited as to all necessary parties, mortgagors, mortgagees, and sub-mortgagees being joined, do not apply here. There is no doubt that the general rule is, that a chose in action assignable only in equity, must be assigned subject to the equities existing between the original parties to the contract; but this is a rule which must yield when it appears from the nature or terms of the contract that it must have been intended to be assigned free from and unaffected by such equities. See *In re Agra and Masterman's Bank* (1). It seems to me that Chapman meant by his order or assignment, to hold out to all the world that Belyea & Co. held absolutely, as so much cash, whatever interest he had in the fund to come into McKean's hands, and that they might use the accepted order to satisfy their own indebtedness.

But suppose this conclusion to be erroneous, the fact is there was a demurrer to the bill, and one of the grounds was that Chapman was a necessary party to the suit. In giving judgment, the learned Judge dealt distinctly with that point, and decided that it was not necessary for the plaintiff to make Chapman a party. From this judgment no appeal was taken, and in my opinion it cannot be taken now. If the defendant was dissatisfied with that judgment, it was his duty to have

1890.  
McKEAN  
v.  
JONES.  
Tuck, J.

(1) Kay 711.

(2) L. R. 2 Ch. 391.

1890.  
McKEAN  
v.  
JONES.  
Tuck, J.  
—

appealed from it. He cannot lie by until after the hearing, when judgment has been given on the merits, and include a matter already decided on demurrer, in a general appeal. By not appealing the defendant accepted as conclusive the judgment on the demurrer. It is not denied that an objection for want of parties may be taken at the hearing, and there are numerous authorities to that effect. But there is no authority, that I can find, to the effect that where the objection is taken by demurrer to the bill, and judgment given for the plaintiff on demurrer, that the same objection is available at the hearing, so as to enable the defendant to appeal from an adverse decision in that respect. It is said that the learned Judge dealt with the question of want of parties in the judgment he gave at the hearing, although he had previously disposed of it in his judgment overruling the demurrer. But he did the same as to several other questions which arose on demurrer. These were all questions of law, and when they were decided by the Judge below, then was the time the defendant should have appealed. Even if the defendant has the right to appeal on this point, I think he ought not to succeed, because to my mind the powerful reasoning of my brother Fraser is conclusive that it was not necessary to make Chapman a party.

As to Chapman's rights, and that Jones took an assignment of the fund, subject to the equities between Chapman and Belyea & Co., there is another important point to be considered. The defendant went into evidence as to the state of accounts between Chapman and Belyea & Co. Counsel for defendant cross-examined Belyea, and examined their own witness Chapman. They went into the accounts as if Chapman had been a party to the suit, and the Judge found that there was a large balance due from Chapman to Belyea & Co. So that, as affecting the result of this suit, it matters not, even if the defendant's main contention is correct, that Jones took the assignment subject to the equities. The evidence shews, and the Judge finds that Chapman is largely indebted to Belyea & Co., and therefore there are no equities in his favor, although he had been party to the suit. In one part of his judgment the learned Judge says: "If Chapman has any claim to the fund under his agreement with Belyea & Co. (and from the evidence



I am of opinion that his indebtedness to Belyea & Co. very largely exceeds anything that the plaintiff can recover under the order) it cannot, as I have already stated, be set up by the defendant as a defence to this suit." Again he says: "There is another view to take, assuming that the collateral nature of the transaction can be inquired into in this suit without making Chapman, and if Chapman, Belyea & Co., also parties; and I assume that it may, if the plaintiff so desired. I have come to the conclusion, as I have just above intimated, that from the evidence before me—and both Belyea and Chapman were examined at the hearing—that Chapman is still indebted to Belyea & Co. in an amount far beyond the amount of the judgment recovered by Chapman against the Providence Washington Insurance Company; and this is all that is necessary to establish the plaintiff's claim in this suit, upon the supposition that he is bound by the collateral nature of the transaction between Chapman and Belyea & Co."

No one who reads the evidence could properly come to any other conclusion. And this Court has more than once decided, notably in *Jones v. Calkin*, "that when the Judge of the Court below, whose judgment is appealed from, has had the witnesses before him, and heard their testimony, an appellate tribunal will never interfere with his decision upon a question of fact, unless for an error in it which is overwhelming." There is no such error here. It was entirely competent for the Court below to make this decree at the hearing, although Chapman was not a party to the suit. Both Chapman and Belyea gave evidence as to the state of accounts between them, and the Judge decided. The defendant cannot now complain of the non-joinder of Chapman, nor has Chapman any right to complain that his equities have been sacrificed. In Story's Equity Pleading, at sec. 237, it is said, "It is not safe, however, in any case, to rely upon the mere non-joinder or mis-joinder of parties as an objection to the hearing; for if the Court can make a decree at the hearing, which will do entire justice to all the parties, and not prejudice their rights, notwithstanding the non-joinder or mis-joinder, it will not then allow the objection to prevail." For this text, *Lambert v. Hutchinson* (1), and *Prin-*

1890.

McKEAN

v.

JONES.

Tuck, J.

1890. *gle v. Crooks* (1) are cited. The Judge in the present case had  
 McKean v. Jones. all the materials before him for making a decree, notwithstanding the non-joinder of Chapman, and no injustice appears to have been done him. If Chapman should have been joined, it is clear that Belyea & Co. should also have been joined. When there is a demurrer for the want of proper parties, it must be shown who they are, so as to enable the plaintiff to amend his bill by adding the proper parties; and if the objection is taken at the hearing the same must be done there. It is not competent for the defendant at the hearing to complain of the non-joinder of one party, and when the bill has been amended by adding his name, then to complain that someone else has not been joined. It is not sufficient to name only one party where there are two who ought to be joined.

There is still another good reason why the objection that Chapman has not been joined ought not to prevail. The evidence shows that there was no pretence that Belyea & Co. owed Chapman anything, until after this suit had been brought. In letters written by the defendant to the plaintiff's solicitors in February, 1885, nothing is said about an indebtedness from Chapman to Belyea & Co. In all the correspondence which took place between Messrs. Weldon, McLean & Devlin, the plaintiff's solicitors, and the defendant, in the months of February and March, 1885, the only persons who are suggested as having any claim on the fund are the defendant, his solicitor (James Straton), Mr. Butt, the plaintiff, the executors of S. R. Thomson, Carvill, McKean & Co., and Francis Carvill & Son. Chapman's name is never once mentioned, although Jones' solicitors were endeavoring to obtain from the defendant the particulars of all legitimate claims upon the fund, with a view to receiving the amount which was justly due the plaintiff. George McKean made an affidavit in an interpleader suit instituted by the Providence Washington Insurance Company, for the purpose of getting direction from the Court as to the payment of the insurance money. In that affidavit he says, "What I did tell Mr. McLean was, that I did not think there would be any balance over after payment of my claim and the claim of Carvill, McKean & Co., and Francis

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(1) 3 Y. & Coll. 666.

Carvill & Son; and that I should in the first place repay the amount paid by Mr. Butt as bail for Chapman in Tufts' suit at my request, and Mr. Straton, and the executors of S. R. Thomson, deceased, their accounts, which were prior to my own." James Straton, who seems to have been solicitor and counsel for the defendant, to have conducted negotiations for him, and to have charge of this fund, in his affidavit says that he pointed out to McLean, "that all that was assigned to Mr. Jones was the balance when collected, in Mr. McKean's hands after payment of Mr. McKean's claim and the claims of Carvill, McKean & Co.; and that it was a condition precedent to Mr. Jones having any right, that the money should be collected and a balance remain in Mr. McKean's hands, and he by his acts prevented any possibility of such conditions being fulfilled." Nothing is said here by the man who knew the most about Chapman's affairs, that Belyea & Co. were indebted to him. It is evident that this was an after thought, started for the purpose of preventing the plaintiff receiving what he was entitled to have under the order. On this point the Judge in the Court below, in delivering judgment, says: "It appeared to me from the evidence that the alleged claim of Chapman was not brought to the notice of the plaintiff or McLean until the plaintiff had either instituted, or was about to institute this suit, and that such alleged claim was not put forward in the first instance as one of the claims which was entitled to priority in payment to the claim of the plaintiff under the order, those being confined to the Butt, that of the Thomson estate, and the claim of Mr. Straton for costs." This finding is conclusive on the point.

Before concluding, I desire to refer to a case mentioned during the argument, and noted in *Canadian Law Times*, vol. 9, p. 305, *In re Central Bank of Canada: Morton's Case* (1). This case arose out of a claim filed with the liquidators of the Central Bank, by the purchaser for value and indorsee of the following receipt: "Received from Cox & Co. the sum of \$6,000, which this bank will repay to the said Cox & Co. or order, with interest at four per cent. per annum, on receiving fifteen day's notice. No interest will be allowed unless the money remains with the bank six months. This receipt to be given

1890.  
McKEAN  
v.  
JONES,  
Tuck, J.

1890.  
McKEAN  
v.  
JONES.  
Tuck, J.

up to the bank when payment of either principal or interest is required." Chancellor Boyd held that "even if such a receipt did not possess all the incidents of a promissory note, yet it was meant to be transferred by indorsement, being made payable to the order of Cox & Co.; and it was therefore governed by a line of authorities which shewed that it was so far negotiable (whether possessing all the incidents of commercial paper or not) as to pass a good title to a *bona fide* purchaser for value, who took without notice of any infirmity of title." I cite this case because I think it affirms the principle by which this order in the hands of Jones is governed.

On the whole, I agree with the admirable judgment of my brother Fraser, and think this appeal should be dismissed with costs.

KING, J. This is an appeal from a judgment and decree of Fraser, J., directing the appellant, McKean (the defendant below), to account for a trust fund in which the respondent (the plaintiff below) claims to be interested under an equitable assignment.

On the 28th February, 1880, one Chapman assigned to McKean by way of security to secure certain advances, etc., his interest in a certain policy of marine insurance upon the barque "Pretty Jemima" (upon which Chapman had then brought an action against the Providence Washington Insurance Company), and in the moneys to which he was entitled thereunder. McKean thereupon became a trustee of the fund to repay himself and to pay over the balance to Chapman. On the 28th April, 1882, in consideration of a debt due by him to Belyea & Co., Chapman assigned and transferred his interest in the said moneys or fund to Belyea & Co., and made a certain order or assignment to them, as follows — (His Honor here read the order) — and delivered the same to Belyea & Co. This assignment or order was, in or about the month of May, 1882, presented to McKean, who thereupon accepted it, and wrote his name across the face of the order. McKean in his evidence, says: "I accepted the document you show me. My idea is that it was presented by a clerk of T. R. Jones. It was undoubtedly here in St. John that it was accepted."

Mr. Justice Fraser found that McKean, "thereby, in the very strongest possible way, gave his assent to the directions of his assignor, Chapman, and agreed to hold the balance of the insurance moneys for Belyea & Co." The learned Judge says: "When defendant accepted the order, which was absolute on its face, he undertook to hold the moneys for Belyea & Co." He also speaks of McKean's name written on the face of the paper, as a written agreement to hold to the order of Belyea & Co. all the balance of the insurance moneys.

1890.  
 \_\_\_\_\_  
 McKEAN  
 v.  
 JONES.  
 \_\_\_\_\_  
 King, J.  
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In the view I take of the case, this point is important. What is the proper conclusion to be drawn from McKean writing his name across the face of the order when it was presented to him? What was done leads one to conclude that the parties treated it as if it were to be dealt with as a bill of exchange. In the case of a bill of exchange the acceptance establishes a liability. That of course is by the law merchant. But seeing this paper, which resembles so much a negotiable instrument but yet is not such, dealt with in the like manner as if it were such, I think the proper conclusion on the facts is that McKean thereby undertook with Belyea & Co. that he would hold the balance of the fund according to the directions of the *cestui que trust* Chapman. In his evidence, McKean speaks of having accepted it. Again the language is borrowed from the law merchant. I think by this, McKean means that he assented to its terms. His acts afterwards towards Jones, in relation to the payment of prior claims, support this view; and it is so found by Mr. Justice Fraser.

I cannot say with Judge Fraser, that McKean has shown in the strongest possible way that he gave assent to the directions of his assignor; but in my opinion he has shown in a way that sufficiently satisfies one of his intention, that he did so assent.

This being so, the cases of *Walker v. Rostron* (1) and *Griffin v. Weatherby* (2), are in point.

In the latter case Blackburn, J., says: "Ever since the case of *Walker v. Rostron*, it has been considered as settled law that where a person transfers to a creditor on account of a debt, whether due or not, a fund actually existing or accruing in the hands of a third person, and notifies the transfer to the

(1) 9 M. & W. 411.

(2) L. R. 3 Q. B. 763.

1890.  
McKEAN  
v.  
JONES.  
King, J.

holder of the fund, although there is no legal obligation on the holder to pay the amount of the debt to the transferee, yet the holder of the fund may, and if he does promise to pay to the transferee, then that which was merely an equitable right becomes a legal right in the transferee, founded on the promise; and the money becomes a fund received or to be received for and payable to the transferee, and when it has been received, an action for money had and received to the use of the transferee lies at his suit against the holder."

The position of Belyea & Co. was therefore not simply that of an equitable assignee of Chapman's interest in the fund. Upon McKean's agreement to pay Belyea & Co., *i. e.*, upon his assent to hold the balance of the fund according to the directions contained in the order of April 28th, 1882, Belyea & Co. acquired as against McKean, a legal right to the balance of the fund.

Belyea & Co. being then the possessors of a legal right, make an assignment to Jones. This assignment is notified to McKean in 1885, before the commencement of this suit, and before McKean had made any appropriation of the fund to Belyea & Co.

This assignment of Belyea & Co. to Jones is an equitable assignment of the interest of the Belyeas in the fund. But it is an equitable assignment of a legal right which Belyeas had to call upon McKean for the balance of the fund.

Under the facts, the only equities which can be set up against it are equities which McKean has against Belyea & Co., but it is not suggested that there are any such.

The relations between Belyea & Co. and Chapman are entirely irrelevant and immaterial, as they lie behind and anterior to the legal obligation created by McKean's implied promise to pay Belyea & Co. the balance, and were unknown to Jones.

Jones' title rests upon a legal right in Belyea & Co. without knowledge of any equitable right outstanding; and consequently he is not affected by any precedent equitable right as between Belyea & Co. and Chapman.

In *Phipps v. Lovegrove* (1), Lord Justice James says: "It is a rule and principle of this Court, and of every Court, I be-

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(1) L. R. 16 Eq. 80.

lieve, that where there is a chose in action, whether it is a debt, or an obligation, or a trust fund, and it is assigned, the person who holds that debt or obligation, or has undertaken to hold the trust fund, has as against the assignee exactly the same equities that he would have as against the assignor." As applied to this case, this means that McKean would have as against Jones exactly the same equities that he would have as against Belyea & Co.

1890.  
 McKEAN  
 v.  
 JONES.  
 King, J.

In Lewin on Trusts, page 596, in commenting upon the rule in question, it is said: "The rule does not mean that the assignee of an equity shall be bound by all the equities affecting the assignor as between him and previous purchasers or encumbrancers under the assignor, but by such as affect the assignor as between himself and his debtor, and any parties then claiming under himself."

There was no objection taken below to the non-joinder of Belyea & Co. It is one of the grounds mentioned in the notice of appeal, but it was not taken below either on the demurrer or the hearing, nor was it argued before us. The plaintiff's counsel did indeed contend that if Chapman should be a party, so should Belyea & Co., but the appellant did not raise the question or rely on the point. And it is obvious upon the evidence that there is no equity as between Belyea & Co. and McKean. At the same time, inasmuch as Jones seeks to prove an equitable assignment from Belyea & Co., of their legal right against McKean, I am inclined to think that if there had been any objection as to Belyea & Co. not being parties, it might be necessary to make them such in order to bind them by the decree.

But, as already said, the objection was confined to the non-joinder of Chapman; and for the reasons already given I think it was not necessary that Chapman should be joined. This, it seems to me, settles all the questions raised by the appellant.

I may perhaps refer to *Goodson v. Ellisson* (1), where it was held that the assignee of a *cestui que trust* may call upon the trustee to clothe the equitable interest with the legal interest, and on his refusal, may by suit compel a conveyance without making the assignor a party.

In my opinion this appeal should be dismissed with costs.

1890.

SIR JOHN C. ALLEN, C. J., WETMORE and PALMER, JJ., took

McKEAN  
v.  
JONES.

no part.

*Appeal dismissed with costs.\**

## CAMERON AND WIFE v. TOWN OF MONCTON.

1889.

November 2.

*Municipal Corporation — Town of Moncton — Liability for non-repair of streets — Negligence — Where defect is caused by a wrong-doer — Evidence — Where immaterial — Cross-examination — Question arising out of direct examination — New trial.*

The Town of Moncton is liable for injury caused by non-repair of a sidewalk constructed by the Town; provided it has either actual or constructive notice of the defect.

The fact that the dangerous state of the sidewalk was caused by a wrong-doer does not relieve the town of its liability.

Per TUCK, J. — That there was no evidence from which the jury could reasonably infer that the defendants were guilty of negligence in not repairing the sidewalk.

In an action by husband and wife to recover damages for injuries sustained by the wife through defendants' negligence in not repairing a street, where the declaration did not contain a count by the husband for loss of his wife's services, she was asked on direct examination, to what she devoted the money she earned? to which she replied, that it went to her children, and the support of her family, for things for the house:

*Held* by WETMORE, PALMER and FRASER, JJ. (ALLEN, C. J., and KING, J., dissenting), that the evidence was immaterial, and was not a ground for a new trial.

In such action the Mayor of the Town gave evidence for the defendants, of the care with which the officials looked after the streets:

*Held* per WETMORE, PALMER, KING and FRASER, JJ., (ALLEN, C. J., dubitante), that he might be asked on cross-examination, if he knew on what street a person had fallen and was injured, and for which an action was brought — such question arising out of the direct examination.

This was an action to recover damages for injuries sustained by the female plaintiff in consequence of the alleged negligence of the defendants in not repairing a sidewalk laid by them on one of the public streets in the Town.

At the trial, which took place before His Honor the Chief Justice at the Westmorland Circuit in January, 1889, the plaintiffs obtained a verdict for \$300, leave being reserved to the defendants to move for a nonsuit.

The evidence is fully referred to in the judgments and need not be given here.

\*Affirmed on appeal by the Supreme Court of Canada. (19 Can. S. C. R. 489.)



June 21, 24, 1889. *W. Wilberforce Wells* moved for a non-suit pursuant to the leave reserved, or, failing that, for a new trial. The evidence shews that the defect in the sidewalk was latent, and the work of a wrongdoer. In such a case, before the corporation can be held liable, it must appear that they had express notice of the defect, or the defect must be so notorious as to charge them with constructive notice, and in fault for not knowing the fact. *Shearman and Redfield on Negligence*, secs. 147, 148. The sidewalk itself was lawful and well built, and the alleged defect was caused by a wrongdoer. *Hart v. Brooklyn* (1); *Castor v. Corporation of Uxbridge* (2). When the defects are occasioned by the wrongful acts of others, notice to the corporation of the defect, or facts from which notice may reasonably be inferred are essential to liability: *Dillon Mun. Corp.* secs. 1024, 1025; *Rounds v. Town of Stratford* (3); *Burns v. City of Toronto* (4); *Dwyer v. Town of Portland* (5); *Clarke v. Town of Portland* (6); *Griffiths v. Town of Portland* (7); *Hill v. City of Boston* (8). No private action, unless authorized by express statute, or unless it clearly appears by the statute that the Legislature intended to give a right of action, can be maintained against the defendants for the neglect of a public duty imposed upon them by law for the benefit of the public; or rather for the neglect of a duty which they are permitted by law to exercise for the benefit of the public, and from the performance of which the corporation receives no benefit or advantage. As to the new trial: it is submitted that evidence was improperly admitted. The question put to the female plaintiff: "To what did you devote the money you earned?" and the answer. "It went to my children and the support of my family, for things for the house," would clearly affect the minds of the jury in the question of damages, and should not have been received. This evidence was no doubt put in for the purpose of creating sympathy. The evidence of the Mayor, as to other suits for damages against the town, was also inadmissible.

1889.

CAMERON  
v.  
TOWN OF  
MONCTON.

*R. B. Smith, contra.* The Act incorporating the Town of

(1) 9 U. S. Dig. 447.  
(2) 39 U. C. Q. B. 113.  
(3) 26 U. C. C. P. 11.

(4) 42 U. C. Q. B. 560.  
(5) 4 P. & B. 423.  
(6) 2 P. & B. 189.

(7) 23 N. B. Rep. 559.  
(8) 122 Mass. 344.

1889.  
CAMERON  
v.  
TOWN OF  
MONCTON.

Moncton did not transfer to it the powers and obligations of the Parish, but gave it original powers and duties, and though the statute does not expressly give this action, it does so impliedly. Under sec. 49, which invests the Council of the Town with the sole and exclusive power over the streets, no discretion is vested in the Town Council as to the repairing and keeping the streets in good condition, and they are clearly liable for an injury caused by their being out of repair. *Hartnall v. Ryde Commissioners* (1). If, however, no such duty is cast upon them by the statute, having constructed and assumed control of the sidewalks in the town, they are bound to keep them so as not to be dangerous. *Griffiths v. Town of Portland* (2); *Smith on Negligence*, 39; *Blackmore v. Vestry of Mile End Old Town* (3); *The Mersey Docks Trustees v. Gibbs* (4). The evidence shews that the street was in a dangerous state for some days, and if the officers of the Town had been watchful, the defect would have come to the knowledge of the Town. As to the evidence of the female plaintiff, even if inadmissible it was immaterial, and the smallness of the verdict shews that it did not influence the minds of the jury. The question to Mr. McKenzie respecting the Killam suit, was called forth by reason of his answers to other questions as to whether the streets were always kept in repair; and under the circumstances was proper.

*Wells*, in reply.

*Cur. adv. vult.*

The following judgments were now delivered :

SIR JOHN C. ALLEN, C. J. The Town of Moncton was incorporated by Act 39 Vic., cap. 40, the 49th sec. of which declares that the Town Council shall have the sole and exclusive power to open, lay out, regulate, repair, amend and clean the streets, lanes and alleys then existing, or that might thereafter be found necessary within the town.

In the year 1876 Mr. Wm. J. Robinson, a land owner within the town, opened a street through his land, extending from

(1) 4 B. & S. 261.  
(2) 23 N. B. Rep. 559.

(3) 9 Q. B. D. 451.  
(4) L. R. 1 H. L. 92.

one public road to another, and sold the land in lots on each side of the street, which was then called Robinson Street. Soon after this, the Town Council laid down a plank sidewalk on one side of the street, placing two rows of sleepers on the ground parallel with the side line of the street, and about four feet apart, and laying planks across them, the ends of which projected several inches beyond the sleepers to which they were spiked to keep them in their places. The planks were all of the same thickness, and the edges sawn, so that they joined each other closely.

On the 5th May, 1888, the female plaintiff was walking on this sidewalk in company with a young woman, who stepped on the end of one of the planks, which, not being spiked to the sleeper underneath it, caused the other end of the plank to rise up above the level of the other planks, and to strike the plaintiff, who fell, and received considerable injury in consequence.

It appeared that this plank had been removed from the sleepers some days before the accident, by the occupier of a lot fronting on the street, for the purpose of draining the water from his lot into the gutter in the street, and had afterwards been replaced upon the sleepers, but not spiked down as before, so that a person walking upon the sidewalk would not discover that this plank was loose unless he happened to step upon it.

Several witnesses on the part of the plaintiffs testified that they had noticed that the plank where the accident happened was loose for a week or more before that. One of them stated that it was in that condition as much as two weeks before the accident, and was so the day before that; that the plank moved from side to side, and sometimes would be laid on its edge. Another witness stated that two planks had been taken out of the sidewalk at the place where the plaintiff fell, as much as a week before the accident, leaving an open space in the sidewalk; but they had been replaced, though not spiked down, as he could feel that they were loose as he walked over them. Another witness had seen the man taking up the plank about a week before the accident, and had seen it up twice as he passed along the street, leaving an open space in

1889.

CAMERON

v.

TOWN OF  
MONCTON.

Allen, C. J.

1889.  
CAMERON  
v.  
TOWN OF  
MONTGOMERY.  
Allen, C. J.

the sidewalk; but he could not say whether the plank was out of its place for two days in succession. After the accident, the defendant caused the plank or planks to be spiked down on the sleepers.

There was no direct evidence that the officers of the town knew of the condition of the sidewalk. The Commissioner of streets stated that he had no information of the plank being loose before the accident; that he had been on the sidewalk and examined it not less than seven days, nor more than ten days before the accident; that he did not see anything wrong about it, and that there were no loose planks on it to his knowledge. He admitted that he had not made such a minute examination of the sidewalk that spring before the accident, as to enable him to say whether there were loose planks in it or not.

The Mayor of the Town, who was also the chairman of the street committee of the corporation, stated that he made it his business to walk round the streets and sidewalks to ascertain where there was any damage, and to notify the Commissioner of streets; but he admitted that he did not know what condition the sidewalk on Robinson street was in at the time of the accident, as he could not tell how long before that he had visited that street; that he was on it after the snow went off, and before the accident, and saw nothing to report to the commissioner.

I think the plaintiff gave sufficient evidence of negligence on the part of the defendants, to have the case submitted to the jury; and I do not think that defendants can reasonably complain of misdirection, if there is any general liability on their part to keep the streets of the town in a reasonably safe state of repair, which is the part of the direction they mainly object to.

In *Hill v. The City of Boston* (1), the case principally relied on by the defendants' counsel to show that there was no liability in this case, it was held that no private action, unless authorized by express statute, could be maintained against a city for the neglect of a public duty imposed upon it by law for the benefit of the public, and from the performance of

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(1) 122 Mass. 344.

which the corporation received no profit or advantage. The negligence complained of in that case, was the improper construction of a staircase in a public school provided by the city, in consequence of which a child attending the school fell and was injured. The duty of providing and maintaining school houses, properly furnished, was imposed by general law upon all towns and cities.

If the negligence complained of in that case was an act of misfeasance (as it would appear to have been), the rule there laid down has not been adopted in this Province. See *Clarke v. Town of Portland* (1), where it was held that if the town assumed the duty of constructing or repairing a street, they must take care to do the work in such a manner as not to leave it dangerous to any person lawfully using it. This was also the rule laid down by the Judicial Committee of the Privy Council in the case of *Macpherson v. The Borough of Bathurst* (2), a suit for negligence against a Municipality; and has also been acted on in several cases in this Province: viz., *Fox v. The Mayor of St. John* (3), *Doherty v. The Mayor of St. John* (4), and in *Matthews v. The Mayor of St. John* (unreported), and *Gilmor v. The Mayor of St. John* (5).

In *Dwyer v. Town of Portland* (6), the distinction was taken between the liability of a Municipal corporation for acts of nonfeasance and misfeasance: holding that there was no liability in the former case.

The alleged negligence in this case was clearly a misfeasance. The defendants constructed the sidewalk where the accident happened, and it was their duty to do the work in such a manner, and to keep the planking in such a state of repair, as not to be dangerous to persons passing over it.

I think there was evidence to warrant the jury in finding that if the defendants had exercised reasonable care in the inspection of the street they could have discovered the defect in the sidewalk, and repaired it; and therefore there is no ground for disturbing the verdict, unless it is on the ground of the improper admission of evidence. In the case of *Castor v. Corporation of Uxbridge* (7), it was held that a Municipal

1889.

CAMERON  
v.  
TOWN OF  
MONCTON.

Allen, C. J.

(1) 3 P. &amp; B. 189.

(2) 4 App. Cas. 256.

(3) 23 N. B. Rep. 244.

(4) 26 N. B. Rep. 618.

(5) 28 N. B. Rep. 325.

(6) 4 P. &amp; B. 423.

(7) 39 U. C. Q. B. 113.

1889.  
CAMERON  
v.  
TOWN OF  
MONCTON.

Allen, C. J.

corporation was liable to damages caused to a traveller by obstructions placed upon a highway by a wrongdoer, of which the corporation had, or ought to have had knowledge: which is just the present case.

The evidence objected to was: 1st, The question to the female plaintiff, as to the purpose to which she applied the money she was earning at the time of the accident, and her answer, that it went to her children, and to the support of her family, and for things in the house.

I cannot see that it was at all material how she spent her earnings before the accident; whether it was all expended on herself and her family, or whether she laid by a portion of it; in fact, what she did with it; or how it can reasonably be said that such evidence might have affected the damages. The only material question for the jury, I think, was, how much was she earning immediately before the accident; and to what extent were her earnings reduced by it.

The other evidence objected to was a question to the Mayor of the Town respecting a suit brought against the town by a person for an injury sustained on another street. That was evidently what the action was for, though it was not so stated. The matter arose in this way. On cross-examination of the Mayor, who was speaking of the streets of the Town generally, the plaintiff's counsel said to him "You don't mean to say that the streets of Moncton are always kept in proper repair?" To which the Mayor answered that they sometimes had blemishes by natural decay. He was then asked by the counsel whether he knew Mrs. Killam, and he said he did. Then he was asked, "Do you know that she brought an action against the Town of Moncton?" He answered, "Yes." He was then asked whether he knew what sidewalk Mrs. Killam fell on. He answered, "As far as my knowledge goes, if I confine myself to the writ served on me, it would be Wesley street and Alma street. She fell upon two streets. I don't know, as a matter of fact, what street she fell on, or whether she fell at all."

This was all the evidence on the subject; and it seems unfortunate that the plaintiffs' case should be jeopardized by such apparently immaterial evidence, which probably had no

effect upon the minds of the jury, though it must have been given for the purpose of influencing them, by showing that other streets besides Robinson street were out of repair. No reference was made to this evidence in the summing up, and it may not have affected the verdict; but can it be said that it did not? I think that is generally a very difficult question for the Court to determine.

1889.

CAMERON  
v.  
TOWN OF  
MONCTON.

Allen, C. J.

In *Doe v. Tyler* (1), it was held that the Court would not grant a new trial on the ground that evidence had been admitted which ought to have been rejected, if, exclusive of such evidence, there was enough to warrant the finding of the jury.

If that was still the rule, I should have no difficulty in saying in the present case that the evidence objected to ought not to affect the verdict. But the rule in *Doe v. Tyler* was very considerably qualified by the Court of Exchequer, in *Crease v. Barrett* (2), which decided that where evidence was improperly rejected, a new trial would be granted, unless, with the addition of the rejected evidence, a verdict given for the party offering it would be clearly and manifestly against the weight of evidence, and certainly be set aside upon application to the Court. In delivering the judgment of the Court, Parke, B., said: "We cannot say, however strong our opinion may be on the propriety of the present verdict, that if the lease had been received it would have had no effect with the jury; nor that it is clear beyond all doubt, if the verdict had been for the defendant, that it would have been set aside as improper; and, therefore, we think there must be a new trial."

The point was again before the Court of King's Bench in *DeRutzen v. Farr* (3), where the decision in *Crease v. Barrett* was expressly affirmed, and it was held that where improper evidence was received, and a verdict given for the party adducing it, the Court would grant a new trial, although there was evidence to the same point in favor of the same party, unless it clearly appeared to the Court that the improper evidence could not have weighed with the jury, or that the verdict, if given the other way, would have been set aside as against evidence. The same rule was followed in *Wright v. Doe dem. Tatham* (4), where Lord Denman, delivering the judgment of

(1) 6 Bing. 561.

(2) 1 C. M. &amp; R. 912.

(3) 4 A. &amp; E. 53.

(4) 7 A. &amp; E. 313.

1889.

CAMERON  
v.  
TOWN OF  
MONCTON.

Allen, C. J.

the Court, and referring to the case of *DeRutzen v. Farr*, said: "We need not repeat our reasons for holding that where evidence formally objected to at *Nisi Prius* is received by the Judge, and is afterwards thought by the Court to be inadmissible, the losing party has a right to a new trial."

That rule was followed by this Court in *McMillan v. Fraser* (1), where a new trial was granted on account of the improper reception of evidence; the Court saying that it was impossible for them to say what effect the evidence produced on the minds of the jury. So, also, in *Maynes v. Dolan* (2), *Girvan v. Mayor of St. John* (3), and other cases.

On the other hand, the following cases were held to come within the exception to the general rule. In *Carter v. Saunders* (4), a Crown grant was improperly received in evidence to explain the intention of the Crown as to one of the bounds of a previous grant; but it had no bearing on that question, nor upon the Judge's direction thereon, and a new trial was refused, the Court being of opinion that the evidence could not have had any bearing on any of the questions left to the jury.

In *Black v. Doherty* (5) a new trial was refused because the evidence was entirely unimportant, and could not have influenced the finding of the jury. And in *Maddox v. Murphy* (6) the execution, if improperly received, had nothing whatever to do with the question whether the defendant had participated in the arrest of the plaintiff, which question the jury found in favor of the defendant.

The present case is distinguishable from each of those cases; for here I am unable to say that it clearly appears that the evidence respecting the suit brought by Mrs. Killam, might not have had some influence with the jury in respect to the amount of damages, by leading them to infer that other streets in the town were out of repair: thus affecting the question of negligence generally.

In England, the practice now is, under the Judicature Act, not to grant a new trial on the ground of the improper admission or rejection of evidence, where in the opinion of the Court, no substantial wrong or miscarriage of justice has been occa-

(1) 2 All. 615.  
(2) 3 All. 573.

(3) 6 All. 411.  
(4) 6 All. 147.

(5) 22 N. B. Rep. 215.  
(6) 27 N. B. Rep. 268.



sioned. See *Shapcott v. Chappell* (1). And a similar practice exists in Nova Scotia under the Judicature Act of that Province. See *Confederation Life Association of Canada v. O'Donnell* (2).

In my opinion there should be a new trial in this case, though I come to this conclusion with a good deal of doubt and much reluctance; because, if the evidence had been considered as at all likely to influence the jury, they might have been directed to exclude it from their consideration, and thus, all question of its affecting the verdict would have been avoided. See *Stewart v. Snowball* (3).

1889.

CAMERON  
v.  
TOWN OF  
MONCTON.

Allen, C. J.

WETMORE, J. I quite agree with the learned Chief Justice, that this action is maintainable, but do not arrive at the same conclusion in respect to the alleged improper reception of evidence.

It is contended that one of the questions put to the female plaintiff, and her answer thereto, were improperly admitted, viz, the question: "To what did you devote the money you earned?" and the answer, "It went to my children and the support of my family for things at the house." From the position of the plaintiffs, as given in evidence, this is what anyone would naturally conclude that the earnings of both plaintiffs went for. The evidence was quite immaterial, and if objected to on that ground, should not have been admitted; but having been admitted, I cannot see how it could possibly have affected the verdict in any way. The rule in this respect is, that if evidence is improperly received and the Court is not satisfied that it did not affect the verdict, then there should be a new trial. For my own part, I am fully satisfied this evidence did not and could not have affected the verdict.

As to the evidence of John McKenzie, the Mayor, referring to Mrs. Killam: Q. "You know she brought an action against the Town of Moncton?" A. "Yes." Under objection, apart from the question of immateriality, whether this might or might not be objectionable, depends upon what the objection was. I think a general objection such as this should not prevail to the upsetting of a verdict. In my opinion, the

(1) 12 Q. B. D. 58.

(2) 10 Can. S. C. R. 92.

(3) 3 P. &amp; B. 597.

1889.

CAMERON  
v.  
TOWN OF  
MONCTON.Wetmore, J.  
—

objection should be so distinctly expressed that the presiding Judge could clearly appreciate the view of the objecting counsel, and could exercise his judgment as to the sufficiency of the objection; and that unless the ground of objection is so stated, it should not have any weight on a motion for a new trial. Evidence, in one view, might be admissible; while, in another view, it might be objectionable. The counsel at the trial might be erroneously of opinion that the evidence was inadmissible in the view he then took of it. If a general objection is to prevail, on motion for a new trial some other objection can be started shewing the evidence inadmissible, that the counsel never thought of on the trial, and which might disturb the verdict; whereas, if a tenable objection had been suggested on the trial, and properly brought under the Judge's notice, in giving it proper consideration, probably no misruling would have occurred. At all events, a fair opportunity would have been given to the Judge to have intelligently decided the question. This rule is, I think, a wholesome one and should be rigidly adhered to. It is but fair to the Judge, and but fair to the parties whose rights are being investigated, and I wish to apply it to all the objections made. Objection to the admissibility of this evidence should not be allowed under the general word "objection" without the grounds of objection being stated.

In *Williams v. Wilcox* (1), it was held that a party objecting to the production of a copy, on account of due search not having been made for the original, must make the objection at the time of the trial distinctly on that ground; if he does not, the Court will not afterwards entertain it. In the judgment of the Court by Lord Denman, C. J., he says:—

"We do not doubt that it was in fact made; but, as the whole class of that evidence, of which this document formed a single item, was also objected to, and the attention of the learned Judge was naturally directed to that more general and important objection, it is probable that this was not so made as to attract his notice. In all cases, especially in one so circumstanced as this, it is the business of the counsel to take care that the Judge's attention is drawn to any objection on which he intends afterwards to rely. Justice requires this, not so much

to the Judge as to the opposite party, who may be willing as in the present case would, probably, have been done, rather to waive the benefit of the evidence than put his verdict in peril on the issue of the objection. If by inadvertence this was not done on the trial, we think we ought not, either upon general principles, or with a view to the particular circumstances of this case to allow the objection to prevail. The admitted document was but one of many to prove what in the end was unquestionable and unquestioned the very great antiquity of the weir; its admission therefore occasioned no injustice; its rejection could not and ought not to have varied the verdict.'

Whether my view is correct or not, referring to the question even if wrong, I cannot see what possible effect it could have upon the verdict. The next question objected to was: "Do you know what sidewalk Mrs. Killam fell on?" To which the witness answered: "As far as my knowledge goes, if I confine myself to the writ served on me, it would be Wesley street and Alma street. She fell upon two streets. I do not know, as a matter of fact, what street she fell on, or whether she fell at all."

The witness was not asked about any writ served on him, and should not have said anything about it. He was simply asked if he knew what sidewalk Mrs. Killam fell on. His answer (eliminating what he said about the writ) is, he did not know as a matter of fact what street she fell on, or whether she fell at all—a proper question and answer, striking out what was said about the writ. Now what possible effect could either of the questions and answers have had upon the verdict? I think none whatever. When the witness answered the last question in the negative, there was an end of this branch of the inquiry. It appears to me the plaintiffs' counsel had a perfect right to interrogate Mr. McKenzie as to Mrs. Killam, or anybody else having fallen in the street, in consequence of evidence given by Mr. McKenzie in his direct examination. I think it will not be disputed that evidence in the abstract may be inadmissible, still, by reason of evidence given on the opposite side it may become admissible. Let us see what Mr. McKenzie says in his direct examination: Q. "Do or do not the other members of the board take upon themselves any

1889.

CAMERON

v.

TOWN OF  
MONCTON.Wetmore, J.  
—

1889.

CAMERON  
v.  
TOWN OF  
MONCTON.

Wetmore, J.  
—

care or duty with reference to the streets in their respective wards?" A. "I think they have given instructions to the commissioner at the meeting of the Council, and would call my attention to the fact of such and such things requiring attention, and I would make it my duty to see the commissioner and have it attended to." This evidence of the Mayor, Mr. McKenzie, was no doubt intended to impress upon the minds of the jury the extra care and supervision exercised in respect to the sidewalks and streets, and thereby help the defence. The defence having put forward this evidence, for what it was worth, in support of their case, it seems to me it was quite open for the plaintiffs to seek to do away with any effect it might have, by asking the witness if he knew what sidewalk Mrs. Killam fell on, and how he acquired his knowledge. (The form of the question may be somewhat irregular, but the ground of objection not being an objection in this respect, is not now available.) Suppose the witness, instead of stating he did not know, as a matter of fact what street she fell on, or whether she fell at all, had stated, "Yes, he heard of, and knew what street she fell on"; could not the plaintiffs' counsel then have asked him if he did not know it was from some defect in the sidewalk? If the answer was in the affirmative, could he not have interrogated him as to whether or not he communicated with the commissioner on the subject? And this with a view of doing away with the effect of that part of his testimony, where he says he would make it his duty to see the commissioner and have it attended to. The value of the evidence would depend upon the witness' answer. Still, I think the plaintiffs' counsel was entitled to interrogate the witness as to the fact, by reason of the evidence elicited on the witness' direct examination, the witness' answer being in the negative rendered any further question on the point useless. The other allegations of improper reception of evidence do not seem to me tenable. And further, I do not see how the evidence, even if wrongly received, could possibly affect the verdict. The evidence objected to really amounted to nothing. The application for non-suit or new trial, should, in my view of the case, be refused.

PALMER, J. This is an action for injuries to the female plaintiff, caused by a defective plank sidewalk in one of the public streets of the Town: tried before the Chief Justice at the Westmorland Circuit, in January, 1889.

1889.

---

 CAMERON  
 v.  
 TOWN OF  
 MONCTON.

The principal facts were: that the street authorities of the Town put down the sidewalk, the planks of which they spiked down with two spikes in each end. About a week before the accident, the owner of a lot bordering on the street wrenched up and took out some of the planks, for the purpose of digging a sewer through the sidewalk.

The evidence leaves it uncertain how long the planks remained out, but one witness says they so remained a day or two, at the end of which time the person who had removed them replaced them, but did not refasten them, and left them in an unsafe condition, and the female plaintiff, in lawfully walking along the sidewalk, fell through and was injured. It was shewn that any person looking at the sidewalk after the planks were replaced, could not tell whether or not the spikes had been replaced.

It was scarcely contended but that the Town would be liable if they were answerable for the state the sidewalk was in, and if they could be sued at all for a neglect of duty to keep the streets in a safe condition.

The second point is not, I think, debatable. We are bound by the case of *Clarke v. The City of Portland*.

The Act incorporating that Town is the same in effect as the Act incorporating Moncton. The other question depends upon several questions. First, it is said that the wrong-doer is the person who tore up the planks, and he alone is liable for his wrong; and no doubt that is so, if the defendants are themselves guilty of no wrong; but I think a person whose duty it is to keep the streets in a safe condition is not relieved of such duty because some wrong-doer has made them unsafe; but in order to make it their duty to do this, it is necessary for them to have notice of the defect, and time to repair it. The fact of it not being evident by inspection, that the planks were not refastened, is evidence to shew that the plaintiff was not guilty of contributory negligence in walking over them, and equally strong evidence that the defendants had no notice of

1889.  
CAMERON  
v.  
TOWN OF  
MONCTON.  
Palmer, J.

the defect, as long as such defect was latent; and therefore there would be no evidence of negligence, if it had not appeared that the planks were out some two days, during which time it must have been most evident to persons whose duty it was to look after the streets, that this street was in a palpably unsafe condition.

The law on this subject is well stated in Shearman and Redfield on Negligence (4th ed.), sec. 369, which is as follows: "As municipal corporations owe a duty of active vigilance to the public in respect to the condition of highways under their control, they are bound to discover any defects therein within a reasonable time, though caused by the negligence and acts of others. For practical purposes, the opportunity of knowing in such cases must stand for actual knowledge; and therefore, where open defects in a highway have existed for a considerable time, notice of them is implied, and is imputed to those whose duty it is to repair them; in other words, they are presumed to have notice of such defects as they might have discovered by the exercise of reasonable diligence. Such notice may be imputed also where a defect, though temporary, has been of frequent occurrence during a long period; for example, where an individual has habitually used an unguarded cellar door in the sidewalk; but, on the other hand, it is not to be imputed where a lawful structure has been proved to be exceptionally safe, during a long period. It is evident that notice should not be so readily presumed from the continuance of latent defects, as in the case of such as are open; while others, like an unguarded precipice at the side of a street, or a decayed wall hanging over a sidewalk, one so dangerous as to challenge immediate attention; so that the jury may be warranted in finding a very short continuance of these notorious defects to constitute a sufficient notice of them. In some States, notice of a defect is not to be imputed to municipal officers when frequenters of the locality did not notice it; but this is not the invariable rule. Evidence of other accidents, occurring at the same place, is admissible for the purpose of shewing that the authorities have received notice of its dangerous character. Upon the circumstances of each case, it is for the jury to determine whether the continuance of a defect has amounted to a

notice of its existence; and in doing so, some weight must be given to the consideration that municipal authorities cannot ordinarily act with the promptness of individuals."

If this is so, it was the duty of the Town to repair the sidewalk when they had notice that it was in a dangerous state, and the only question remaining to make them liable is, whether, because the wrong-doer had apparently, but not really, repaired it, this relieved them, and I cannot see on what principle it can do so; instead of doing their duty themselves they allowed another, depending upon him to do it properly, and it has not been done in consequence. If this were allowed to relieve them, the most dangerous traps could be made by irresponsible parties, and no person would be safe in walking the streets of any town, and the public, instead of being secured from injury by the trust reposed in and cast upon the Town, would thereby be lulled into a false security. The whole question appears to me to be this: In case a person had a private plankway on which he was in the habit of walking, and on which it would be dangerous to walk if not fastened, and some wrong-doer had torn up the planks, which he knew; then such wrong-doer had apparently put them back, would it be prudent for him to walk on these until he had first ascertained that they were fastened? I think it would not. So here, the officers of the town knowing that this sidewalk was torn up, and it would not be safe until it was not only put back, but refastened, was evidence of want of prudence in them to allow the public to use it until they had ascertained that it was safe by the planks being refastened. They had no right to infer that the wrong-doer had refastened them because he had replaced them.

I therefore think the verdict was right.

KING, J. This is an action to recover damages for injuries sustained by the female plaintiff, in consequence of the alleged negligence of defendants in not repairing a sidewalk laid by them on Robinson street, in the Town of Moncton. Upon the trial the plaintiffs obtained a verdict for \$300, and this is a motion for a nonsuit pursuant to leave, or for a new trial.

Robinson street runs from Main street to Mountain Road,

1889.

CAMERON

v.

TOWN OF  
MONCTON.

Palmer, J.

1889.  
CAMERON  
v.  
TOWN OF  
MONCTON.  
King, J.

and is about 120 rods in length. It was laid out about thirteen years ago by one Robinson, through a tract of land which he divided into building lots and sold as such, and on which houses have been erected. The street was thrown open to the public, and the town repaired it, laid sewers in it, and otherwise dealt with it in the same way as with the other streets of the town — Robinson being one of the town councillors while some of this work was going on.

Prior to 1887 the town had laid a sidewalk upon the street, from Main street to the Intercolonial Railway crossing. In June or July, 1887, the town extended this sidewalk on the east side of Robinson street to the end of it, at Mountain Road, and it was on this part of the sidewalk, at a point about three-quarters of the distance from Main street, that the accident took place, on May 5th, 1888.

The sidewalk was properly constructed. Sleepers or stringers, graded level to the ground, were laid lengthwise of the street, and then planks five feet long, 6 to 9 inches wide, and 2 inches thick, were laid across the stringers, closely driven together and spiked to the stringers by two spikes in each end. The ends of the planks projected 4 or 5 inches beyond the stringers.

About the latter part of April, 1888, a resident on the street, named Clay, forced up a plank with an axe, to drain off water from his premises. The plank was afterwards put back in its place, but was not spiked down, although the spikes (or at least the heads of them) were still in the plank. On the morning of May 5th, the female plaintiff was walking along the sidewalk, in company with a young woman who was slightly in advance, and who, by stepping upon the projecting portion of the plank, caused it to spring up and trip the female plaintiff, who fell and was injured.

The evidence on behalf of the plaintiff was directed to show that the sidewalk was in a defective state to such an extent, and for such a length of time as that the defendants might, and with reasonable care ought to have known of its being in an improper and dangerous condition. Some of the witnesses for plaintiffs speak of but one plank as being loose, others of two planks, or at least of one plank split in two. The plain-



tiffs' witnesses also differed as to the length of time that the plank was loose before the accident. The male plaintiff says that it was loose for over two weeks, while the other witnesses for the plaintiffs will not state that it was over a week, although some of them upon direct examination gave a much longer period.

At the risk of being tedious, it may be well to state the substance of the evidence more at length.

The female plaintiff says that she saw the plank out about a week before the accident, but is not positive that it was a week. She saw it out once only, about 5 a. m. She walked over the sidewalk once a day, and noticed nothing in its appearance at this place that was different from the rest of the sidewalk.

Miles Steeves passed over the street twice a day, down and up. He saw the place open one evening, about a quarter after five. Does not mind particularly that he saw it more than once. The next morning when he came down he thinks the planks were laid in. Two planks had been taken up. On his direct examination, he says that this was about a fortnight before the accident, but on cross-examination he says that he is not prepared to state positively that it was over three days before the accident that he saw the hole. On direct examination, he was asked as to the condition in which the planks were after he saw the hole and before the accident (which he saw), and he says: "I noticed that the planks were loose when I passed over them. I saw them loose with my eyes and felt them with my feet — felt them moving. That state of affairs lasted about a fortnight before I saw this woman fall."

On cross-examination, however, he stated that previous to seeing the hole he had no recollection of seeing anything unusual, and after that and up to the time of the accident he does not remember seeing anything unusual, and would not swear that more than three days elapsed in the meantime.

It is quite probable that (except as to time) these statements may be reconciled by supposing that he only knew of the planks being loose (as distinguished from their being out) by walking on them; and that when he says, on his direct exami-

1889.

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CAMERON  
v.  
TOWN OF  
MONCTON.

---

King, J.

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1889.

CAMERON  
v.  
TOWN OF  
MONCTON.

King, J.  
—

nation, that he saw them loose with his eyes, he has reference to seeing them out.

As to the likelihood of noticing that the planks were loose after they were put back into place, he says: "A person walking ordinarily along would not observe whether they were spiked or not. \* \* You would not detect without walking on them. If you examined them closely, you would think they were spiked, because the old spikes were in them. If you were walking over them you might think they were spiked. \* \* If a man was walking over them he might suppose, not knowing they were loose, that they were spiked, but if he examined them closely he would find they were not spiked. When I examined them after the accident I found they were not spiked. Nothing was holding them, except their own weight, down on the sleepers. There were two loose then. I tested them myself. The two were lying together. I put my foot on them and tested them, and they would fly up, (i. e., after the accident).

John Gunn, who also saw the accident, says that there were two pieces of wood loose then, but whether they formed one plank or not he does not know. He passed over the sidewalk not less than four times a day, but did not see any plank out. He was positive, however, that one plank was loose as much as a week before the accident, but cannot say that he ever saw or noticed that the planks were loose more than once, and the only time he can speak to its being loose is once.

He also says that if a person did not happen to step on the plank he might not have perceived it to be loose.

George Rix used the sidewalk every day, three or four times a day. He saw Clay take up the plank with an axe, and it appeared to be splintered off in taking it out. On direct examination he said that this was three or four weeks before the accident, but on cross-examination he says: "As far as I will go it was a week, and beyond that I will not go positively." He says that he never noticed more than one plank, but that he saw it out twice, and could not swear that the last time he saw it was the same day he saw Clay take it out; at all events it was about the same time. Whether it was one or two days

in succession he would not say. He observed twice, in walking over it, that it was loose.

As to the chance of observing it he says: "Persons might not notice it walking over it unless they stepped on it, or were looking at the sidewalk. I knew it had been loose and I walked over it without observing it was loose myself." He also speaks of having once noticed that the plank was not dropped into its place, but that its edge was up upon the next one. At one time, he says, that this was one of the two occasions referred to when the plank was up, and at another time, he says that this was one of the two occasions when he saw it loose.

The last witness for plaintiffs was William Cameron, the male plaintiff, who says that he passed over the sidewalk every day, and although he did not see any plank out yet he saw two planks loose, or rather a wide plank split in two that was loose. This he saw loose 15 or 20 times. Every time that he passed over the sidewalk, for two weeks or more before the accident, he saw that the planks were loose. The planks, he says, were just moved back and forth out of their place. They were lying on the stringers, and sometimes they would be moved to one side and sometimes to the other, and sometimes the plank would be laid on its edge.

For the defence it was proved that the town officers had no actual knowledge of the defect; and it was shown that on the morning of the accident several men had gone to work on Robinson street to repair the street, on orders of the road commissioner, and had begun at the Mountain Road end. These workmen met the female plaintiff on her return home, after the accident, and learned of it from her. One of them, a man named Marshman, father of the young woman who was with Mrs. Cameron, went to the place and repaired the sidewalk. Marshman says: "I discovered the plank either by feeling with my hand or putting an axe under it. I could not tell which was it without trying them. One plank was loose; it was about eight or nine inches wide; it was not in two pieces and was not split.

The road commissioner, Scott, testified, that he had been on this sidewalk, not less than seven nor more than ten days

1889.

CAMERON

v.  
TOWN OF  
MONTGOMERY.King, J.  
—

1889.

CAMERON  
v.  
TOWN OF  
MONCTON.

King, J.

before the accident; and that he walked along and examined it, looking at it to see that there was nothing wrong about it; but that he did not make such a minute examination of it as to be able to tell whether there were or were not loose planks in it; that the only examination of it that he then made, was to walk over it, and that loose planks might have been there without his knowing of it. He noticed, however, that the sidewalk was slightly twisted by the frost at a point between the place of the accident and Main street.

It appeared that there were about 32 miles of street in Moncton, and 15 miles of sidewalk, whether of plank or cinder.

The learned Chief Justice asked the jury whether the defendants had the means of knowing of the defect, and whether they could, by the exercise of ordinary and reasonable care and inspection, have discovered the defect; and he told them that if Scott examined carefully as he went along, and no defect was apparent, and if he exercised reasonable and proper care in making the examination, that would be sufficient.

The jury found for the plaintiffs; and I think it must be taken that they found that Scott did not exercise reasonable and proper care in making the examination, and that if he had exercised such care the defect would have been discovered.

There is a paragraph in Scott's evidence which is liable to misconception unless explained. He is asked on cross-examination, as follows: "It was easy for you to tell by looking at this place that a plank was taken up?" The witness had previously stated that he had examined the place after the accident; and looking at the answer to the above question, I think it must be clear that the question and answer relate to what was observed by Scott after the accident. His answer is: "I don't know as I should have noticed it if I did not know the place. I could see a plank had been taken up and planked down. I am prepared to say only one plank presented that appearance. I will swear that plank was not split."

The question upon the facts as stated is, whether reasonable men could have found as the jury did.

Apart from Scott's evidence, I do not think that a verdict for plaintiffs could be sustained; for, considering that the side-

walk was new, and considering the extent of the streets and sidewalks of the town, it could not be deemed a want of care for the town officers not to be on this sidewalk during the two weeks before the accident. But Scott's evidence places him upon the sidewalk from seven to ten days before the accident, and although, therefore, barely within the time during which the female plaintiff, and Gunn, Steeves and Rix speak of the plank as being loose, still clearly within the time named by Cameron as that in which he saw the plank loose every time he passed over it.

Now, for myself, I do not believe Cameron's testimony. I believe that his interest has led him into a looseness of statement. His testimony is to my mind inconsistent with that of all the other witnesses called for the plaintiffs. His statement that he saw the plank or planks loose 15 or 20 times during two weeks or more, and that they would be shoved to one side or the other, or on the edge, and that he so saw them every time he passed over the sidewalk, is entirely inconsistent with the evidence of the other witnesses for plaintiffs, who had as abundant opportunities to see the state of the sidewalk, and who saw nothing that Cameron saw, but saw something very different. However, as Cameron's statement is consistent with itself, as he does not contradict himself in his own examination, I am afraid that I have no right to deny to it any credit that the jury may have seen fit to attach to it.

Then taking Cameron's testimony as true, and treating it for this purpose as the only evidence on the point, might not reasonable men conclude that if Scott failed to see what Cameron saw every time he walked over the sidewalk, he failed to exercise the reasonable care in observation that he should have exercised when he was going over the sidewalk with a view to observation?

Several additional circumstances may have entered into the consideration of the jury, as for instance the testimony of some of the witnesses that there were two planks loose, or if not two, that the plank was split, and if so would attract attention. And the further fact stated by Rix that the plank appeared to be splintered off in taking it out by Clay, as indicating that it might attract attention. And the further fact

1889.

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CAMERON  
v.  
TOWN OF  
MONCTON.  

---

King, J.  

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1889.  
CAMERON  
v.  
TOWN OF  
MONCTON.  
King, J.

that when Scott saw the plank after the accident, it bore the appearance of having been raised. He says, "I could see a plank had been taken up and planked down. I am prepared to say only one plank presented that appearance." This appearance might, however, be that presented by driving extra spikes in the ends. There is also the additional circumstance that Scott appears to have anticipated the possibility of there being loose planks, for he says that he instructed his workmen to look after this sidewalk and see that there were no loose planks.

To conclude upon this branch of the case, while (if the matter were for me to decide) I should have no hesitation in finding that there was no negligence on Scott's part, (for planks in a sidewalk are not to be individually tested like the wheels of a railway train about starting,) I feel compelled by the possible credit that may be attached to Cameron's evidence, to come reluctantly to the conclusion that there was some evidence to go to the jury.

As to the other grounds of motion for nonsuit, the 3rd, 4th, 5th, 6th and 7th, were not argued. In *Reg. v. High Hadden* (1), Blackburn, J., held that a body liable to repair the highways, was liable to indictment if they did not put and keep the highways in such repair as to be reasonably passable for the ordinary traffic of the neighborhood at all seasons of the year. That is also the measure of liability where an action is brought by one who sustains a special and particular injury arising out of the common cause of injury.

As to the 7th point, that Robinson street, upon which the accident occurs, is not owned by the Town, but that it is the private property of Mr. Robinson, who laid it out, *Rex v. Leake* (2), is an authority to the contrary.

As to the 6th point, it is not necessary to discuss whether or not the Town of Moncton is under an obligation to repair the streets, etc., within its bounds. I may, however, refer to the opinion of His Lordship, Mr. Justice Gwynne, in *Griffiths v. Town of Portland* (3), where he says: "Upon the question whether the statute of the corporation of the Town of Portland imposes upon the corporation the duty of keeping the

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(1) 1 F. & F. 678.

(2) 5 B. & Ad. 468.

(3) 11 Can. S. C. R. 346.

streets and sidewalks in a sufficient state of repair, I am of opinion that the effect and intent of the statute creating the municipality and placing under its exclusive control, the public streets and highways, does impose upon the corporation the co-relative duty of keeping them in repair." The 49th sec. of 38 Vic. cap. 40, incorporating the Town of Moncton, is at least as strong as the provisions of the Portland Act referred to by Mr. Justice Gwynne. But in this case it is not necessary to go into this, because by assuming to repair the streets and by laying a perishable sidewalk, the defendants are bound to reasonable care to keep it secure.

Then as to the grounds for new trial. The objection to Dr. Purdy's evidence was abandoned, as was the objection to the evidence of Steeves and Rix.

The following in the evidence of the female plaintiff was objected to:

Q. To what did you devote the money you earned? A.—It went to my children, and the support of my family for things for the house.

Mr. *Wells* contended that the effect of this was to enhance the damages by exciting sympathy. If the declaration joins a count by the husband in his own right for loss of the wife's services as may be done (this evidence would be admissible, under Consol. Stat., c. 37, sec. 41,) but if the claim is solely in respect of the cause of action accruing personally to the wife the evidence seems to me bad; and as it was objected to, and as the damages are quite high, I should think that the pressing in of this piece of evidence should entitle the defendant to a new trial.

As to the evidence of Cameron as to his opinion of his wife's ability to work, this was objected to before us only on the ground of its being opinion. I think it proper enough. The question really bears on the extent of the injury to her health as manifested by her work.

As to the evidence of John Mackenzie respecting the suit brought by Mrs. Killam against the Town of Moncton, Mr. *Wells* says that his objection is not to the mode of proof, but to proof of the fact. I think the question would have been clearly wrong, were it not that the defendants, by

1899.

CAMERON  
v.  
TOWN OF  
MONCTON.

King, J.

1889.

CAMERON  
v.  
TOWN OF  
MONCTON.

King, J.

some of their questions to Mr. Mackenzie, rather aimed to show that the town was looking well after the streets generally. Amongst other things, Mr. Mackenzie, speaking of Robinson street, said that it was as good as any of the streets in the town. The evidence as to the sums available for street-repairs rather tended to show that defendants were seeking to make out what is suggested by the 5th ground of motion for nonsuit as a defence, viz., that their general care of the streets and sidewalks was good.

The grounds of misdirection and nondirection were not argued except as involved in the motion for nonsuit.

As to the damages being excessive; I think them high, but can hardly say they are excessive.

Upon the whole, then, I think there should be a new trial, on the point of evidence referred to, unless it appears that the declaration contains a count claiming damages in respect of the husband's right. And in the event of there being such a count, I think the rule should be discharged. \*

TUCK, J. I think there is no evidence in this case on which a jury might reasonably and properly conclude there was negligence.

On the fifth day of May, 1888, the female plaintiff, while walking on the sidewalk on Robinson street, in the Town of Moncton, tripped over a plank, fell forward and was pretty badly hurt. She was going along the street at the time, with a small girl, who, being on the inside of the walk, stepped on the end of a plank, which was loose. This caused the plank to fly up at the other end; her toes caught in it; hence the accident. Her evidence shows that this plank was not spiked, and had been out a week before that time and been put in again. This plank was in position apparently the same as the others, and did not appear to be different from them. The accident occurred from the plank not being fastened down.

Miles Steeves, another witness, speaks of two planks having been taken up near where a man named Clay lived, and this he noticed about a fortnight before he saw Mrs. Cameron fall. He says that when he came up after the accident the planks.

\* The declaration did not contain a count by the husband for loss of his wife's services. Rep.



were in the same position as if they had been spiked, and that a person walking casually over them would not observe whether they had been spiked or not.

John Gunn, about a week before the woman fell, saw one or two planks loose at the same place. He found it out by frequently walking over them; he never saw them out altogether; he could not say that he saw or noticed more than once that the planks were loose, although he was in the habit of frequently walking up and down the street. He says that it might well happen that a person would walk over that street a great deal and not discover it was loose, unless he happened to step on that particular plank; and that all the time the spike was out, the plank remained in its position the same as if it had been spiked. This witness passed over the place not less than four times a day, and only once saw the plank loose. There were two pieces of wood loose, but whether they formed one plank or not he did not know.

George Rix testifies that he lived on Robinson street, about a quarter of a mile to the north of where Clay lived, and walked up and down the street every day. About the last of April, just before the accident, he saw John Clay, a colored man, who lives close by the sidewalk, pry up a plank and take it out, leaving a hole. The plank was put back after one or two days; for a day or two it was left out altogether. When it was put back it was not spiked down; was lying on the sleepers, but did not appear to be level. When one walked over it, it would move out, and sometimes was partly out. This continued so for a week or more. Where the plank was taken out a good deal of water ran through, which appeared to be drained out of John Clay's yard, and to run into the road ditch. On cross-examination, the most this witness will say is that he saw the plank taken up; that he saw it up twice, and how long it was up on each occasion he cannot say. He says that the sidewalk was built by laying stringers on the street, and in line with it, and placing planks crosswise; that the planks had two spikes in each end; were from six to eight inches in width, two inches in thickness, and the plank in question was eight or nine inches in width; and the sidewalk was from four to five feet in width. The planks were close together. They were not jointed with a plane, but sawed

1889.

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CAMERON  
v.  
TOWN OF  
MONCTON.

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Tuck, J.  

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1889.  
CAMERON  
v.  
TOWN OF  
MONCTON.

Tuck, J.

on the edges, and would lie close together. This plank was in its position after he had seen it taken out, although not spiked, and previous to the accident he had gone over it a number of times when it was in position.

William Cameron, the other plaintiff, gives an account somewhat different from that of all the witnesses called in his behalf. He states that he passed at different times where the plank was taken up; that it was up for two or three weeks before it was fastened down; sometimes it was shoved to one side of the sidewalk, and more times it would be laid on its edge, and moved back and forth; it was up for two or three weeks before being put down; that he passed over it back and forth every day to his work; that it was taken up sometime in April, but he does not know by whom. This is doubtless and exaggerated statement, probably influenced by the large interest the witness had in the result of the suit. His evidence cannot be reconciled with that of his own wife, or of his witnesses, Steeves, Gunn and Rix. On cross-examination the witness says, that he did not see any planks taken away; that they were just moved back and forth out of their place; they were never removed from the stringers; they were lying on the stringers, and sometimes would be moved to one side, and sometimes to the other. He speaks of two pieces of plank being loose; that from fifteen to twenty times he passed over it and saw it loose; that the day before his wife met with the accident he knew the plank was loose; and on every occasion on which he passed over the planks, until his wife met with the accident, he observed distinctly that they were loose. The foregoing is a synopsis of all the evidence bearing on the question of negligence, given on behalf of the plaintiffs.

For the defendants, the witnesses were Mr. Robinson, who laid out the street in 1876; John McKenzie, Mayor of the town; Howard Scott, commissioner of streets; John Marshman, an employé of the corporation under the direction of Scott; and Paul Lee and Benjamin Toombs, members of the Town Council in 1888. The Mayor was chairman of the street committee of the Council. In the mornings in the summer, he says, he takes a walk with the commissioner to see where any repairs to the streets are necessary; that the sidewalk on Robinson street

was built in 1887, was a good sidewalk, and not inferior to any other side street sidewalk in town. Previous to the accident he never had information from anybody that there was any defect in Robinson street sidewalk. Robert Scott states that he has been street commissioner for the Town of Moncton for three and a half years; that he devotes most of his time to it, walking the streets, seeing that they are kept in repair. That Robinson street sidewalk was built in June or July, 1887, with stringers lengthwise, and cross planked, two-inch top plank, 3 by 4 inch stringers; a good substantial sidewalk of the kind; generally two spikes on each end of the plank. The sleepers are graded down level with the ground, and the planks are six, eight or nine inches wide, and five feet long. He superintended the building of it. After the sidewalk was spiked he went up and saw it in front of Clay's. It was spiked, with two spikes in each end. The sidewalk was in good condition before the accident; never knew of that plank being loose before that, and had no information of it, and was on Robinson street six or seven days before that. He superintended originally the spiking of this street; took particular care to look over it every day; watched it closely, and examined every plank in it. The planks lay as closely together as they could be driven up. Twenty-five or fifty feet were laid down and then they were driven up solid, in order to give no cracks. This sidewalk was in a good state of repair at the time; was really a better walk than any other on the side street, and would only be equalled or excelled by Main street itself. On cross-examination, he says that he walked over this sidewalk not more than ten days before the accident, looking at it to see that there was nothing wrong about it, and there were no loose planks to his knowledge. He knew of none before the accident. Afterwards, when he examined it, only one plank presented the appearance of having been taken up, and it was not split.

Paul Lee, one of the Council, says that he gives attention to the condition of the streets; goes over them to see if there is anything wrong: that the sidewalk on Robinson street was in good repair that spring, and he had no information of any defect.

1889.

CAMERON  
v.  
TOWN OF  
MONCTON.

Tuck, J.

1889.

CAMERON  
v.  
TOWN OF  
MONCTON

Tuck, J.  
—

Jeremiah Marshman says, that he was employed by the corporation in the spring of 1888, under the direction of Mr. Scott. That he came on Robinson street, on the morning of the 5th of May, and did not observe any thing wrong with the sidewalk; that it is a good sidewalk, and in a good state of repair. After hearing of the accident he went to Clay's, that morning, and found the plank in its place, not spiked. One plank was loose, about eight or nine inches wide. It was not in two pieces and not split. This was the first he ever heard of this plank being loose.

The Mayor says, that according to the surveyor's report there are about thirty-two miles of street in the town; and no less than fifteen miles of sidewalks including cinder and plank walks.

This evidence shows beyond doubt that the corporation had no actual notice before the accident that the plank on Robinson street was loose, and there was no general negligence in the care of the streets of the town. On the contrary the Mayor, members of the Council and the commissioner took extra care to see that the streets were in good repair. The witnesses for both plaintiffs and defendants concur in testifying that the sidewalk on Robinson street where the woman fell, was in good repair that spring; that it was comparatively new, having been laid in the summer of 1887, and was well and securely built; that there were two spikes in the end of each plank, and there would have been no loose plank, had Clay not pried up one for the purpose of draining water off his land. There being no actual notice, can it be said that the defendants had constructive notice? In other words, does the evidence bring this one within the doctrine laid down in some of the cases, that the defendants either knew or ought to have known the condition of Robinson street, where this plank was loose? An ordinary observer, in going along the sidewalk, after the plank had been taken out and replaced, could not tell whether this plank was loose or not. It was only when some one stepped on the plank, out of the ordinary way, that he would discover that it was not spiked. To any ordinary observation this plank looked like the others which had spikes in them. The defect was a latent one, and had not existed for

more than a week. It was out of the question, that with thirty-two miles of street, and fifteen miles of sidewalk, that each plank could be examined every day, or every fortnight. The corporation might be held to a stricter accountability if the streets generally were out of repair. But here the streets generally were in good repair, and the sidewalk on Robinson street at this place had been laid the year before, and had been carefully examined from time to time. Under such circumstances it cannot, in my opinion, be said that notice of the defect to the defendants should be implied. Had the plank been removed by one of the defendants' own servants, even without authority, if done in the ordinary course of his work, the case might be different. Here, however, the mischief is wrongfully done by a stranger, without the knowledge of the defendants, and without any reasonable means of their obtaining knowledge. One would suppose, that if it had been generally known to the persons who went over this sidewalk, that there was a loose plank, witnesses would have been called to prove the fact. And yet of the many, who during the week must have passed over where the defect was, only two or three are called that knew there was a plank in this sidewalk not spiked. If then those who used this sidewalk daily had no knowledge, how can the defendants be fixed with notice of the defect, so as to make them liable for negligence?

To make a corporation liable for negligence in not keeping its streets and sidewalks in repair, it must not only appear that the defect could have been prevented or cured by the use of ordinary care, but the corporation must in some way be connected with the defect; as, for example, by having directly caused it, or having assented to its creation by another, or having, with actual or constructive notice of its existence, permitted it to remain. When then will notice be implied? The law has been thus stated: "For practical purposes, the opportunity of knowing in such cases must stand for actual knowledge; and, therefore, where open defects in a highway have existed for a considerable time, notice of them is implied, and is imputed to those whose duty it is to repair them: in other words, they are presumed to have notice of such defects as they might have discovered by the exercise of reasonable

1889.

CAMERON  
v.  
TOWN OF  
MONCTON.Tuck, J.  
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1889.  
CAMERON  
v.  
TOWN OF  
MONCTON.  
Tuck, J.

diligence. Such notice may be imputed also, when a defect, though temporary, has been of frequent occurrence during a long period; for example, where an individual has habitually used an unguarded cellar-door in the sidewalk: but, on the other hand, it is not to be imputed where a lawful structure has been proved to be exceptionally safe during a long period. It is evident that notice should not be so readily presumed from the continuance of latent defects, as in the case of such as are open." See *Shearman and Redfield on Negligence*, secs. 290 and 369.

I have carefully examined the evidence of negligence in this case, to see if it is of such a character that a jury might reasonably find a case of liability on the part of the defendants, and I have failed to find such evidence. For this reason, I am of opinion that a nonsuit should be entered.

It is also contended that no private action can be maintained against the Town of Moncton for the neglect of a public duty which it is permitted by law to exercise for the benefit of the public, and from the performance of which the corporation receives no benefit or advantage. Without considering the question whether, under its Act of incorporation, the Town of Moncton possesses original powers, or transferred powers, it is sufficient for me, following the decisions of this Court in *Clarke v. The Town of Portland* (1) and *Griffiths v. The Town of Portland* (2), to hold that the defendants, having constructed and assumed the control and management of this sidewalk, are bound to take due care to keep it in such a state of repair that it shall not become dangerous to those who use it.

It is not necessary for me to consider the question of misdirection, or the improper reception of evidence.

FRASER, J., was of the opinion that the verdict should not be disturbed.

*New trial refused.*

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(1) 3 P. & B. 189.

(2) 23 N. B. Rep. 559.

## CLARK v. SCHOFIELD ET AL.

1889.

October 26.

*Costs — Review of taxation — Equity appeal.*

Where the clerk in taxing costs does not act on a wrong principle, the Court will not in general inquire into the correctness of his opinion upon a matter of fact.

A review of taxation was refused where the objectionable items were very small.

In Trinity Term, 1889, on motion of *C. A. Palmer* a rule *nisi* was granted for a review of the taxation of the costs of the appeal in this suit (1).

October 4, 1889. *C. N. Skinner, Q. C.*, shewed cause. Where the items objected to in a bill of costs are small, a review will not be granted: *Bell v. Moffat* (2); *Newton v. Boodle* (3). *Hendricks v. Hallett* (4), shows that the Court will not review unless the clerk proceeded on a wrong principle. The Court will not inquire strictly where the clerk has acted by consent, as in the case where no minutes were actually settled. *Goold v. Dummett* (5).

*Cur. adv. vult.*

The judgment of the Court (PALMER, J., taking no part) was now delivered by

FRASER, J. This was an application on the part of the defendants for a review of the taxation of the costs of the appeal to this Court sitting in Equity, which appeal was dismissed with costs.

The principal objection was to an allowance by the clerk of an item of \$65, for drawing or preparing the case on appeal. The ground of the objection was that the work had not been done; that Mr. *Charles N. Skinner*, the plaintiff's counsel, had, with the consent of Mr. *Charles A. Palmer*, the counsel for the defendants, obtained from the files of the Court all the papers

(1) 28 N. B. Rep. 281.  
(2) 2 P. & B. 406.

(3) 4 C. B. 359.  
(4) 1 Han. 170.

(5) 12 Jur. N. S. 614.

1889.

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CLARK  
v.  
SCHOFIELD.

which had been filed with the barrister for the purpose of printing the case, and that the case had been printed from such papers.

Mr. *Skinner's* affidavit in answer to the application shewed that a copy at least of one fourth of the printed case had been actually made, and that when the printer struck off the first copy of the printed case such printed copy was read and corrected throughout, and occupied two persons as long as it would have taken to make a copy of the case on appeal, and after such copy had been read and corrected by him, it was then sent to the printer, and the printer struck off the case on appeal from such corrected copy; that the preparation of the case on appeal took a considerable portion of six days; that he, Mr. Skinner, gave a good deal of his time to the examining, comparing and settling the case on appeal, and that Mr. R. Chipman Skinner gave several days of his time, with the aid of a clerk, to the reading of printed proofs and the examining and correcting copies of papers for the printer in getting the case ready for appeal. I think, under the table of fees, that the solicitor is entitled to make a charge for copying all the proceedings in the cause which are, by the order on appeal, required to be printed. By sec. 63 of cap. 49 of the Consol. Stat., it is the duty of the appellant to have the pleadings, evidence and papers necessary for the purposes of the appeal printed. In order to do the printing, a copy must be made for the printer. In the present case such portions of the proceedings as were filed with the barrister were obtained off file for the purpose of printing the case. Mr. Palmer, in his affidavit does not state what papers were filed with the barrister; but admitting that the word "with" was intended to mean "by" then, what papers before, or in connection with the Barrister's inquiry would be filed by him. I think they would be merely his report and the evidence taken by him. In addition to such report and the evidence the plaintiff would require to print the bill, answers and replication, as well as the various judgments given and the decrees made in the case.

It is not alleged that copies were not made for the printer of all the proceedings other than the Barrister's report and the evidence.



I think it was for the clerk to determine whether the work as charged "drawing, or preparing the case on appeal," had been done.

1889.

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CLARK  
v.  
SCHOFIELD.

Mr. *Skinner's* affidavit shews what work was done in the preparation of the case on appeal, and states distinctly that the printer struck off the case on appeal from a corrected printed copy, prepared, as is set forth in his affidavit.

It was not claimed that any portion of this work was charged for by the printer, or included in his account for printing the case; and as the clerk considered that what had been done was work done in drawing or preparing the case on appeal, and as the amount allowed would be just what the solicitor would be entitled to charge for copy, viz., 650 folios at 10 cents per folio, \$65, I think the clerk properly allowed the item.

The clerk was the judge in the matter, and the discretion used by him will not be reviewed by the Court as a matter of course; they will not in general interfere, unless they see clearly that he has come to a wrong conclusion.

Where the clerk is not mistaken in principle, the Court will not, in general, inquire into the correctness of his decision upon a matter of fact. *Doe dem. Smith v. Webber* (1). In that case, on page 384, Williams, J., says: "The Solicitor General does not say that the master has mistaken the principle; and the discussion is only upon a matter of fact, which is undoubtedly for the decision of the master. We ought not to be called upon to weigh matters of fact; that is for the discretion of the master, where the master is not mistaken in principle."

In *Hendricks v. Hallett* (2), it was held that if the clerk in taxing acts upon a wrong principle the Court will review the taxation.

The clerk's decision in this case was not wrong in principle; and I think the conclusion he came to upon the facts was a proper one; and even if the Court would review his decision upon a matter of fact, the facts here do not afford any ground for review.

The other items in the bill of costs—some fourteen in num-

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(1) 4 N & M. 381.

(2) 1 Han. 170.

1889.  
CLARK  
v.  
SCHOFIELD.

ber—which were objected to, amounted in all to only the sum of \$9, and, as Mr. *Palmer* admitted at the argument, were merely brought forward because of the larger item of \$65, which was sought to be reviewed. Several of these small items are for drawing affidavits; some of them affidavits of service, which, it is said, were not produced before the clerk, and also some 80 cents for stamps on these affidavits.

It was claimed that perhaps some of these small services may not have been actually performed, but that it had not been the practice on taxation to require production before the clerk of such affidavits, the claim to have them taxed resting upon the right of the solicitor to make and charge for such affidavits. They are services which the solicitor requires to have done, but they are often rendered unnecessary by the opposite party appearing or answering the application.

I think it not necessary to say whether, strictly speaking, all the items should have been taxed; but admitting some of them to have been improperly allowed, there appears to have been a practice to allow them, and as the fourteen items altogether only amount to \$9, as already stated, and the taxed bill is \$300.70, the amount may be said to be too small to warrant the ordering of a review of taxation. *Bell v. Moffatt* (1); *Newton v. Boodle* (2).

*Application refused with costs.*

## BUSBY v. SCHOFIELD ET AL.

1889.

October 26.

*Conversion of cargo of a vessel—Verdict against the master—Subsequent action against the ship-owners—Whether owners can compel plaintiff to sign judgment against master—Joint tort-feasors—Agreement not to enforce judgment against one—Whether a release of others—Pleading—Trover—Recovery, without satisfaction—Judgment.*

The owner of a cargo of coal recovered a verdict against the master of the vessel for wrongful conversion of it, but did not sign judgment. He afterwards brought an action against the owners of the vessel for the wrongful act of the master, whereupon one of the defendants applied to stay the proceedings until the plaintiff signed judgment in the action against the master, in order that such defendant might plead the judgment recovered, as an answer to the action against him :

*Held*—That the plaintiff was entitled to discontinue the suit against the master of the vessel, and that the defendant in the action against the owners had no right to require the plaintiff to sign the judgment in the action against the master.

An agreement between the plaintiff and the master of the vessel, that in consideration of plaintiff not proceeding with the suit, the master would not in any way attempt to force the plaintiff to sign judgment therein, does not operate as a release of the suit against the master.

One of several wrong-doers against whom a verdict has been obtained, has a right to agree with the plaintiff that he shall not be obliged to sign judgment on his verdict.

A judgment against the defendant in an action of trover without satisfaction does not vest the property in the goods in the defendant.

This was an application made to Mr. Justice Fraser, at Chambers, at the instance of the defendant, George E. Fenety, for an order to stay all proceedings in this suit absolutely, or until judgment should be signed in a suit brought by the present plaintiff against one Jacob R. Winchester.

The matter was referred by His Honor to the Court.

October 2, 1889. *E. McLeod, Q. C.*, argued in support of the motion, and

*W. Pugsley, S. G., and C. A. Palmer, contra.*

The facts which appeared in the affidavits, and the argument of counsel, are fully referred to in the judgment.

*Cur. adv. vult.*

1889.

The following judgments were now delivered :

BUSBY  
v.  
SCHOFIELD.

FRASER, J. A summons having been granted by me in this suit, at the instance of the defendant, George E. Fenety, calling upon the plaintiff to show cause why all proceedings in this suit against the defendant, Fenety, should not be stayed absolutely, or until judgment should be signed in the suit of William L. Busby (the plaintiff in this suit) against Jacob R. Winchester, at the hearing of the summons I referred the matter to the Court, and directed it for that purpose to be entered upon the motion paper.

The present suit is brought against the defendants, Samuel Schofield, William T. Miller, the said George E. Fenety and Frederick E. Sayre, as owners of the brigantine "Curlew," for the wrongful conversion of a cargo of coal, of which the plaintiff was the owner, and which was brought to St. John in the brigantine; but which the captain, the said Jacob R. Winchester, and the managing owner, Schofield, wrongfully refused to deliver, and which Schofield subsequently sold and disposed of, and received the proceeds.

The grounds, substantially upon which it was sought by Fenety to have the proceedings stayed until judgment should be signed in the suit mentioned, were that Busby had brought an action against Winchester, as Captain of the vessel, for the wrongful refusal to deliver the same coal, and had, under a count in trover in his declaration, recovered a verdict therefor against Winchester, as will appear in the report of the case of *Busby v. Winchester* (1); and as the present action was commenced in the month of August, 1888, and after the verdict had been obtained against Winchester, that Fenety had a right to compel Busby to sign judgment against Winchester upon the verdict so obtained against him, so as to enable Fenety to plead that judgment as an answer to the present action. Fenety also claimed that he was entitled to an absolute stay of proceedings upon the ground that the plaintiff had released his action against Winchester, which he contended would prevent his further sustaining the present action, and he further claimed that the plaintiff had entered into an agreement with

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(1) 27 N. B. Rep. 231.

the defendants, Schofield, Miller and Sayre to release them from liability, which would release him, Fenety; or if only an agreement for a release, it would amount to an equitable release, and in either event would afford ground for a stay of proceedings.

1889.

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BUSBY  
v.  
SCHOFIELD,  

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Fraser, J.  

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In the suit of *Busby v. Winchester*, the defendant demurred to the 1st, 2nd and 3rd counts of the declaration, which were counts in contract, and judgment was given for defendant on his demurrer. So that if judgment was to be signed in that suit, it would be for the plaintiff upon his verdict upon the trover count for the coal, and for the defendant upon his judgment on demurrer. The plaintiff would therefore be entitled to the costs of the cause, and the defendant to the costs of the demurrer.

It appeared from the affidavits and the *viva voce* examination of witnesses before me, that Winchester, the defendant, who had been arrested in the suit and gave bail, had been in the month of July last, rendered to gaol in discharge of his bail, and on examination for the purpose of disclosing the actual state of his affairs before the Clerk of the Peace for the City and County of Saint John, was, upon such examination, by order of such Clerk discharged from arrest and imprisonment. It further appeared that an exoneretur was directed to be entered upon the special bail-piece, on account of a variance between the cause of action set forth in the writ, and the affidavit to hold to bail.

Subsequent to the discharge of Winchester from arrest, an arrangement was made by the defendant, Schofield, acting for Winchester, with Mr. Charles A. Palmer acting for the plaintiff, which, the counsel for the defendant Fenety contends, was a release of Winchester; or if not, was a fraudulent arrangement by which Fenety was deprived of having the benefit of pleading the judgment, which, but for such arrangement, he as one of Winchester's principals, could have required to be entered up, so as to enable him to plead it.

The arrangement referred to was this: that as Winchester had no property available to meet any judgment that might be entered up against him, the plaintiff expressed his willingness not to take any further proceedings in the suit, upon the

1889.  
 BUSBY  
 v.  
 SCHOFFELD.  
 —  
 Fraser, J.  
 —

defendant undertaking not to force him, the plaintiff, to sign judgment in the suit; and to carry out this arrangement the following papers were signed and interchanged between the plaintiff, acting by Mr. Palmer, and Winchester acting by Weldon & McLean, his attorneys, and Mr. Schofield.

(Court and cause.)

"It is hereby agreed in consideration of the plaintiff not taking any proceedings against Captain Winchester, that the defendant, or his attorney, will not in any way attempt to force the plaintiff to sign judgment, or on his failure to sign same, make (or allow to be made in his name) any application for leave to sign judgment. The appointment for taxation is hereby withdrawn.

Dated this 23rd day of July, A. D., 1889.

(Signed)

WELDON & MCLEAN,  
 Defendants' attorney.

I consent to the above.

(Sgd.) JACOB R. WINCHESTER."

A duplicate of the above agreement was signed by Mr. Charles A. Palmer, as attorney for the plaintiff.

The latter paper was forwarded by Mr. Schofield in a letter to Capt. Winchester, he calling it in the letter a release. The former paper was handed to Mr. Palmer for the plaintiff.

Mr. Fenety's counsel claims that these two papers constitute a release by Busby to Winchester. I do not think they amount to a release, or to anything more than what may be called a *stet processus*; or, in other words, a discontinuance by consent of the parties, without the payment of costs to either party. It was surely competent to the parties to do as they did. The plaintiff finding, if he entered up his judgment against Winchester, that he could not get the fruits of it from him, was quite willing to drop all further proceedings in the suit, upon the defendant agreeing not to force the plaintiff to enter up the judgment; for if he entered up judgment the defendant would be entitled to the costs of the demurrer.

It is urged upon the part of Fenety, that the plaintiff, having obtained a verdict against Winchester, as Captain, he (Fenety), as one of the owners of the "Curlew," had such an

interest in the suit as entitled him to demand that judgment be signed upon the *postea*; and the case of *Taylor v. Nesfield* (1) was relied upon as supporting this contention.

Admitting that this action is brought against the defendants for the same act of non-delivery of the coal as entitled the plaintiff to recover against Winchester, the Captain, what is there to prevent one of several wrong-doers against whom a verdict has been obtained, consenting that the plaintiff shall not be required to sign judgment on such a verdict? I see nothing to prevent his doing so; nor can I find any warrant for a co-wrongdoer stepping in and claiming that he has a right to insist that such judgment shall be signed, in order that he may plead it to an action pending against him for the same wrong as was the subject of the first action.

Winchester, no doubt, could have insisted upon the judgment being signed; and upon the authority of *Brinsmead v. Harrison* (2), and same case on appeal (3), the defendants in the present action could have pleaded the judgment, although unsatisfied, in bar of the action against them for the same wrong.

Although Winchester could have insisted upon the signing of the judgment, the defendants could not compel him to claim such right, and it was equally in his power to do just exactly what he did; that is, abandon his right against the plaintiff to the costs of the demurter, in consideration of the plaintiff not signing judgment upon his verdict against him.

In *Taylor v. Nesfield*, already mentioned as relied upon by Mr. Fenety's counsel, the application for the *postea* was made by Nesfield, the defendant in the suit, and not by the party in the other suit, who afterwards pleaded the judgment *puis darrein continuance*. Then, again, in that case, Lord Campbell, C. J., in his judgment, says that the plaintiff, if he thought proper, had an opportunity of entering up such judgment as he might elect. He declined doing so, and it must be taken for granted that he preferred that the defendant should have the *postea* and enter up the judgment, and the defendant had done so in the form which was to be expected. The other judges all concurred, and said that the plaintiff

1889.

BUSBY

v.

SCHOFIELD.

FRASER, J.

(1) 4 E. &amp; B. 402.

(2) L. R. 6 C. P. 584.

(3) L. R. 7 C. P. 547.

1889.  
BUSBY  
v.  
SCHOFIELD.  
FRASER, J.

could have elected how the judgment, so far as it related to the verdict on the first count was concerned, should be entered, but having failed to do so, and allowed an order to be made that the *postea* be delivered to the defendant, that the judgment as entered up by the defendant, in accordance with the *postea*, ought not to be disturbed.

In the present case, Busby elected not to enter up any judgment on his verdict; and as the defendant, Winchester, assented to that course being taken by the plaintiff, I cannot see what right these defendants have to interfere with the arrangement.

It was urged that as Schofield, the managing owner, retained Messrs. Weldon & McLean to defend for Winchester, the owners would be liable for Weldon & McLean's costs, and that that gave these defendants a right to ask that the judgment be entered up.

It would be a manifest injustice to the plaintiff, was such a consequence to follow as the result of the owners retaining Messrs. Weldon & McLean to defend Winchester. If the owners were bound to satisfy any judgment that the plaintiff might obtain against Winchester, there would be some reason in the contention. What injury have the defendants sustained at the hands of the plaintiff, by reason of his carrying on the suit against Winchester and obtaining a verdict against him? No injury whatever that I can see. It appears to me there was nothing more natural or reasonable for the plaintiff to do in the Winchester suit, than what was done by him when he found that Winchester was not worth anything; and I am inclined to the opinion that if Winchester had applied for a summons to get the *postea* and to enter up his judgment on the demurrer, that upon affidavit shewing his insolvency, the Court would have permitted the plaintiff to have entered a *nolle prosequi* or retraxit upon the trover count.

It is true that the practice is, not to allow the plaintiff after verdict, to discontinue without the consent of the defendant; but that is where the verdict is found for the defendant. Where the verdict is for the plaintiff, I cannot find anything to shew that he may not, at his option, terminate the suit by *nolle prosequi*, but that he can be forced by the defendant to sign judgment as upon a verdict.



I see no ground, therefore, for staying the proceedings in this suit until judgment should be signed in the suit of *Busby v. Winchester*.

Then, again, the plaintiff claims that he is proceeding in this suit also for a wrongful sale and conversion of the coal by the defendants after the wrongful refusal to deliver the coal, upon which refusal the action was brought against Winchester; that is, for a conversion of the coal by the defendants at a period subsequent to the commencement of the action against Winchester.

It is very clear that even if judgment had been signed against Winchester upon the verdict, the property in the coal would not be divested out of the plaintiff without satisfaction of the judgment: *Brinsmead v. Harrison (supra)*—and therefore Busby's right of action for the subsequent conversion by the defendants, if he could establish such a conversion, would remain unimpaired.

Admitting that Fenety would have a right to have judgment entered up in the Busby-Winchester suit, and that such judgment would be an answer to any conversion arising from the non-delivery of the coal by the captain, and that the plaintiff, by what he has done, has deprived Fenety of the right to plead such judgment, the most he could be entitled to would be an order depriving the plaintiff of the right to give evidence of, or rely upon that conversion in this suit, leaving it open to the plaintiff to give evidence of any other conversion of the coal by the defendants. But, for the reasons already stated, I do not think Fenety can insist upon judgment being signed upon the verdict.

This brings me to consider the other ground upon which a stay of proceedings is asked for: viz., that plaintiff has entered into an agreement with Schofield, Miller and Sayre to release them from liability in this suit, and that thereby Fenety is released.

The evidence shews that no agreement whatever was made between the plaintiff and the defendant Sayre for a release, or on any other matter touching this suit or its subject matter.

As respects the defendants Schofield and Miller—it appears that

1889.

BUSBY  
v.

SCHOFIELD.

Fraser, J.

1889.

BUSBY  
v.  
SCHOFIELD.  
—  
FRASER, J.  
—

Mr. Schofield, acting for Miller and himself, induced the plaintiff, through Mr. Palmer, his attorney, to make an arrangement by which he, the plaintiff, agreed that after he had obtained judgment in this suit he would not take (to use the words contained in the memorandum of arrangement) "supplementary proceedings" against either of them.

Schofield says that he told Palmer that neither he nor Miller was worth anything, and he wanted Palmer to get plaintiff to release them; that Mr. Palmer positively refused to do this, but said he would consult the plaintiff and Mr. Pugsley, the plaintiff's counsel in the cause, and that he might agree that he would not act as attorney against him after judgment, by having him up for examination under cap. 38 of the Consol. Stats. Schofield wanted to know from Palmer whether, if a judgment were obtained, and he subsequently acquired property, it would be liable to an execution upon the judgment, and Palmer replied that it would; that Palmer subsequently told Schofield he had seen the plaintiff and Mr. Pugsley and that plaintiff would assent to what was contained in a memorandum which Mr. Palmer then handed to Schofield.

A like memorandum was also prepared for Miller and handed to Schofield for him.

Mr. Palmer explained that what he meant by "supplementary proceedings" was the examination of the defendant under cap. 38. The plaintiff stated that the draft of the memorandum was shewn to him by Mr. Palmer and "supplementary proceedings" explained to him by Palmer to mean as already stated; that he plaintiff never agreed to release Schofield or Miller, nor authorized anybody to release them. Schofield stated that he did not understand the memorandum as releasing him or Miller, but only relieving him from being harrassed and annoyed by an examination under cap. 38.

It was claimed by counsel for Mr. Fenety that these memorandums amounted to a release, or if not that they were an agreement for release, and in effect constituted an equitable release; and if so were sufficient to justify the stay of proceedings applied for by the summons.

Giving the fullest effect to all that took place between Schofield and Palmer, and to the written memorandums, in my

opinion they are not releases of Schofield and Miller, but at most, are agreements on the part of the plaintiff not to enforce any judgment he obtained in the suit by supplementary proceedings against them; and admitting that supplementary proceedings would include execution, that he would not enforce any execution against them.

This, a plaintiff surely could do, for upon an execution under a judgment in this suit, the plaintiff, by indorsement, could direct the amount to be levied upon the defendant, Fenety, alone.

I cannot distinguish the effect of this arrangement from the cases in which it has been held that a covenant not to sue one of two joint debtors does not operate as a release to the other—*Hutton v. Eyre* (1)—and that even where it is stated in the covenant that if he does sue, the deed of covenant may be pleaded in bar: *Dean v. Newhall* (2).

The case of *Dewar v. Sparling* (3) seems to me also very applicable to the present case upon this point. The head note of that case is: "A stipulation not to sue one of two judgment debtors is no discharge of the other, though there should be no express reservation of rights as against such other.

"The plaintiff recovered a judgment against two defendants, each of whom made a conveyance of his property. The plaintiff filed bills impeaching the conveyances, respectively, as fraudulent; in the one suit the plaintiff obtained a decree, and the other suit he settled, consenting to the bill therein being dismissed without costs: *Held*, that these circumstances did not necessarily imply a settlement or discharge of the debt.

"The only further evidence of the terms of the settlement was contained in a letter from the plaintiff to his solicitors, stating as to the second suit, that he had settled with the defendants, taking \$45 costs, and agreeing not to prosecute the suit, or look to the defendants therein for any portion of the judgment; and the letter inquired: 'What about *lis pendens*? Will not bill have to be dismissed to have it removed?' *Held*, that the judgment against the other debtor was not discharged."

1889.

BUSBY  
v.  
SCHOFIELD.  
—  
Fraser, J.  
—

(1) 6 Taunt. 239.

(2) 3 T. R. 136.

(3) 18 Grant 633.

1889.

BUSBY  
v.  
SCHOFIELD.  
—  
Fraser, J.  
—

The Vice-Chancellor, in that case (p. 636), says: "According to the weight of authority, including the latest cases both in law and equity, the leaning should not be in favor of construing a stipulation to be a release rather than a covenant not to sue, but should be the reverse; and stipulations which were in form releases, have been construed, in view of the whole agreement, as mere covenants or stipulations not to sue, so as to prevent their operating as discharges of other persons whom there was no intention of discharging; so that, as Sir G. M. Giffard said, in *Green v. Wynn* (1), even where parties put into a deed words which, standing alone, amount to a release, the Court will not give that effect to them, but will take the whole of the deed together, and effectuate that which was the real intention of the parties."

The real intention of Busby, and of Schofield and Miller, in any light in which the arrangement can be looked at, was not that Busby's rights should be extinguished by what was done, but that whatever proceedings were had in the suit, Busby would not use them for the purpose of vexing or harrassing Schofield or Miller; and, if you will, that he would not enforce his claim by execution against their property or persons. All this amounts to nothing more than if he had by his deed covenanted not to look to them for any part of the judgment that he might recover in the suit; and this clearly brings the case within the principle of those authorities cited as to the effect of a covenant not to sue. Practically these memorandums may, as regards Schofield and Miller, be to them as beneficial as releases would have been; but under the authorities they are not releases, nor can they be used by other persons liable, as in this case, to have a judgment against them for the same wrong, as matter which would operate in their discharge.

At all events, if what took place amounts to a release available to the defendant, as is contended for by his counsel, I see nothing to prevent his pleading such release; but it would not be any ground for staying the proceedings in this action.

It seems to me that the defendant, Fenety, if the owners are liable for the conversion of the coal, may really be obliged to pay the whole damages and costs that may be recovered by

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(1) L. R. 7 Eq. 28.

the judgment for the conversion; but the injury done to him is not by the plaintiff. The wrong to him will have arisen from the fact that Schofield, the managing owner, received the proceeds of the sale of the coal, passed the amount to his own credit at the bank, and allowed it to be swallowed up and lost in his general business. As between the plaintiff and the defendant, Fenety, I am at a loss to see what the plaintiff has done to prejudice the rights of Fenety, for he could have sued Fenety alone, if Fenety, as one of the owners, is liable for the conversion; or if Busby had sued all, and recovered judgment against all, he could still have directed that the amount be levied upon Fenety's property alone, without any right on Fenety's part to say that the levy should be pro rata upon the property of all the defendants.

It was further urged that Winchester, as captain, and Schofield, as managing owner, were both agents of Fenety to the knowledge of plaintiff, and it was their duty to save Fenety harmless, and the plaintiff knowing this should not have been a party to making the arrangements that he did with them. Whatever duty Schofield and Winchester owed to Fenety they, and not the plaintiff, must be answerable for a breach of such duty. As between the plaintiff and Winchester and Schofield, the two latter were wrongdoers towards the former, and in all the arrangements the plaintiff made with them, as he owed no duty to Fenety, he was not guilty of any want of good faith towards him. He was only dealing with some of several wrongdoers in a way that it does not lie in Fenety to complain of, and in a way that, I think, he was fully warranted in doing.

In my opinion the application for stay of proceedings should be refused.

SIR JOHN C. ALLEN, C. J., WETMORE and KING, JJ., concurred: the Chief Justice stating that he did so very reluctantly.

PALMER, J. This is an application by Mr. Fenety to stay the proceedings in this cause, on the ground that the plaintiff brought an action against one Winchester, a person jointly

1889.

BUSBY  
v.  
SCHOFIELD.  
Fraser, J.

1889.  
BUSBY  
v.  
SCHOFIELD.  
—  
Palmer, J.  
—

liable with Fenety, and obtained a verdict against him, and then agreed that he would not further proceed in that action, and in effect would not collect the damages from him or Schofield, another of the joint tort-feasors.

The defendant, Winchester, was master of a vessel of which the other defendants were joint owners, and on whose behalf she was being run, and in the course of that business Schofield, for the master, refused to deliver the plaintiff his cargo, upon which the plaintiff brought an action of trover and recovered a verdict for the value of the cargo. After the commencement of that action, Schofield, acting as ship's-husband, sold the cargo, and thereupon this action was brought against all the owners. It is apparent that the obtaining of such a verdict is no answer to the selling of the cargo after action brought, as the property in it would remain in Busby, notwithstanding the verdict, until it was paid; but it may be a question whether a judgment would not be an answer to any conversion up to the time of the commencement of that action. This, it is not necessary to decide. This is an application to the equitable jurisdiction of the Court; and the absurdity of there being any equitable ground to interfere with the plaintiff's legal rights, is sufficiently apparent by the consideration that if defendant, Fenety, was liable to the plaintiff for a good, legal and meritorious cause of action, and any hard and fast rule of law would prevent the plaintiff from enforcing such claim, Fenety would have to have the benefit of it without paying the plaintiff: but so far from he having any equity in that direction he would get it in spite of its being inequitable and a great hardship in the plaintiff; if he has got such a legal right it is the strictest right, and should not be extended, and if such exists the law has given him the right to plead it, and this would be decided on his plea. If there is any legal obligation as to the action against Winchester, Fenety is no party to it, and has no control over it in any way. If he has any equities in it as against Winchester, that could only be set up and tried in a suit in equity, in which Winchester and all others interested are made parties and brought before the Court. This rule is only served upon the plaintiff, and he is alone called upon to answer it.

Again, although this Court has control over its proceedings in a particular suit, yet this is only by a proceeding in that suit; it cannot, like a Court of Equity, interfere with the proceedings in one suit by proceedings in another, and, therefore, it cannot make an order in the suit of *Busby v. Winchester*, to which Fenety is not a party, by an order in another suit of *Busby v. Schofield et al.*, in which Fenety is a party. Therefore, this Court can make no order affecting the proceedings in *Busby v. Winchester* by an order in this suit.

The only thing it could do is, that if any of the defendants in this suit had an equity that would preclude the plaintiff from proceeding in the suit, this Court in this suit could order the proceedings stayed, and would do so if it could not be pleaded.

It would not stay if it was claimed that there was a release, for that could be pleaded and better tried on that plea. I apprehend it would be stayed if it was clearly shown that the plaintiff had agreed with Mr. Fenety that he would not proceed with the suit against him, or if he had an agreement that no execution should be issued against him after judgment, and it was done, the Court would set it aside, but no agreement would be enforced further than to have it complied with. If it was only not to issue execution the Court would allow the judgment to be signed. In other words, the Court having ascertained what the agreement was, will see it was carried out. There is nothing in law or equity to prevent a person having a claim against several tort-feasors, or even several joint promissors or covenantors, from agreeing with any one of them that he will not proceed against some, or collect from any particular one, without prejudicing his right to sue the others.

I confess myself totally ignorant of any principle of law to prevent a person who has been wronged by several tort-feasors, dealing with any of them in any way he chose to think will best secure redress, so long as he does not alter the liability of such tort-feasors among themselves independent of his own action. He can sue one or more; stay proceedings against any; or go on when he likes; the only question in each case is, the legal rule of procedure; and the legal effect to attempt to set up that there is any equity upon him to exercise his legal rights in any

1889.

BUSBY

v.

SCHOFIELD.

Palmer, J.

1889.

BUSBY  
v.  
SCHOFIELD.  
—  
Palmer, J.  
—

way he chooses, is what I never heard of, and has no existence in principle; and to look for such a case is absurd until the courts think it their duty to protect a wrong-doer from the claim of the person wronged, without the wrong being compensated for.

As to the agreement between one of the tort-feasors and the person wronged, it is a matter between the parties to such agreement, who can discharge or enforce it as they choose; it can in no way affect either the injured party's claim against the others, or the wrong-doers' rights among themselves.

Therefore this application should be discharged with costs.

TUCK, J., being related to one of the parties to the suit, took no part.

*Application refused.*

1890.

ISAACS, APPELLANT, AND GROTHE, RESPONDENT.

*April 16.*

*Bill of Exchange — Action by drawer against acceptor — Line through drawer's name by pen-mark — Whether a material alteration.*

Action by drawer against the acceptor of bill of exchange payable to drawer's order. When the bill was offered in evidence, the drawer's name shewed that a line had been drawn through it with a pen. No evidence was given to explain it, and the defendant on presentment for payment did not deny his liability.

*Held* — (WETMORE, J., dissenting) — that the mark through the drawer's name did not amount to an alteration of the bill, and that the defendant was liable.

This was an appeal from a decision of the Judge of the Saint John County Court refusing a new trial.

The action was by Grothe upon a bill of exchange drawn by him to his own order upon Isaacs, and accepted by Isaacs. On the production of the bill on the trial, it appeared that a red line had been drawn with a pen through Grothe's name, both where it appeared as drawer and where it appeared as endorser. There was no evidence offered as to how or by whom this was done. The defendant on the trial objected, that the draft since acceptance by him had been changed by



the name of the drawer being erased. The learned Judge ruled against the objection, and plaintiff had a verdict which the learned judge on motion for a new trial refused to set aside.

1890.

ISAACS  
v.  
GROTHE.

February 4, 1890. *Jordan*, in support of the appeal. The name of a drawer is absolutely necessary in order to create a bill. Even if the paper has the name of one upon it who signs as acceptor, unless there is also the name of a drawer upon it, it is still nothing more than an inchoate paper. There must be two parties to the instrument. The signing of a name and then erasing it leaves the paper in the same condition as if never signed at all. The *Mutual Safety Ins. Co. v. Porter* (1), 1 Daniels on Negotiable Instruments (2nd ed.), 81.

*C. A. Macdonald*, contra. The notice of protest, which was in evidence, shows that the bill at the time of the acceptance and presentation was a good bill. Any erasure of the name of the drawer must have been after that time. But it is submitted that the alteration is immaterial. There is a distinction between an alteration and a spoliation. See *Tomlins v. Lawrence* (2); *Atkinson v. Hawdon* (3). [KING, J., refers to *Foster v. Dawber* (4).]

*Jordan*, in reply.

*Cur. adv. vult.*

The following judgments were now delivered :

TUCK, J. This is an appeal from the judgment of the Judge of the County Court of the City and County of Saint John.

The action was brought on a bill of exchange, in the words and figures following :

"\$106.50.

Montreal, 12 July, 1888.

"Four months after date pay to the order of myself one hundred and six (50-100) dollars, value received and charge same to account of

L. O. GROTHE.

(1) 2 A.R. 230.  
(2) 6 Bing. 376.

(3) 2 A. & E. 623.  
(4) 6 Exch. 339.

1890.

ISAACS  
v.  
GROTHE.  
Tuck, J.

"To MR. A. ISAACS, St. John."

Written across the face of the bill were the words :

"ALFRED ISAACS,

"Accepted, payable at Bank of Nova Scotia, St. John, N. B."

It was indorsed "L. O. GROTHE."

When this bill was put in evidence it appeared that a stroke of a pen had been run across the name "L. O. Grothe," both where he had signed as maker and where he had signed as indorser.

The only ground put forward in the argument for the appellant was, that this was not a bill of exchange, inasmuch as the name of the drawer and indorser (the same person in this case) had been erased, and no explanation had been given by the plaintiff of the erasure. It does not appear from the evidence by whom or for what purpose, or when a pen had been drawn through the signature "L. O. Grothe." No change has been made in the terms of the contract, amounting to an alteration. The name L. O. Grothe has not been erased, for it is as plain to be read now as ever it was; nor do I think that a mere running a pen through the name amounts to a cancellation so as to relieve the acceptor from liability. If a pen had been run through the name of the acceptor, although by accident or innocently done, in such a case the burden of proof would be on the holder to show the accident or innocence in order to recover. But here the acceptor was in no way damnified by the pen stroke through the drawer and indorser's name. If anything had happened between his acceptance of the bill and the commencement of the action, to discharge the appellant from liability, it was for him to show this at the trial. No such alteration had been made in the bill as to put the burden of proof upon the plaintiff to explain it. Ordinarily, I know, when an alteration is apparent on the face of the instrument, the onus is upon the holder to show that it was made before or contemporaneously with its issue. In the present case, I think, it matters not if a pen was drawn across the name after the issue of the bill. That would not affect the rights of the acceptor, who is primarily liable. In fact the appellant did not dispute his liability on the very day the bill became due. For on that day, when Mr. Gilbert presented it to him for pay-

ment at his shop, he said, there is a bill of sale upon this place, and I cannot pay. He did not dispute his liability, nor claim that the bill had been cancelled. His reason for not paying, as he said, was his inability. Suppose this bill had been discounted by the plaintiff at a bank, and owing to the appellant's failure to take it up, he, the plaintiff, had been obliged to pay it, and when he did so, he had run his pen, just as in this case, through his own name, could it be successfully contended that what had been a bill had ceased to be a bill so as to discharge the acceptor, unless the holder offered some explanation of the pen stroke? I think not. In short, my view is, that this is not within the principle of decided cases which determine that the effect of an alteration of a written contract is to nullify and destroy it as a legal obligation.

Therefore, I think this appeal should be dismissed with costs.

KING, J. I think that upon the case as presented, there is no question but that the bill at one time was a perfect bill. On the notes of trial, it is stated that the counsel for the defendant admitted the defendant's signature on the draft, and also presentment, as alleged in the notary's protest. The protest was in evidence, and it showed the bill without the name being erased or cancelled. It was proved that when the bill was presented for payment, the defendant said: "I have nothing more to do with it; there is a bill of sale upon this place, and I cannot pay." Looking at the evidence, and at the objection of defendant that the draft had been altered since acceptance I think it is to be taken that the bill at the time of acceptance and presentation for payment was a perfect bill.

Then the question is as to the effect of the lines subsequently drawn through plaintiff's name. I do not think that this comes within the class of cases as to alterations. An alteration is where an attempt is made to give to the bill a different effect from what is expressed; at least a material alteration is that. Here there is no such attempt. The plaintiff may have just drawn his pen through his own name; but until he says or does something which unequivocally amounts to a renunciation of his rights, the defendant is not at all discharged. In

1890.  
ISAACS  
v.  
GROTHE.  
Tuck, J.  
—

1890.  
ISAACS  
v.  
GROTHE.  
King, J.

*Foster v. Dawber* (1), it was held that by the law of merchants an acceptor may be discharged from liability by the express renunciation of the holder, but the renunciation must be unequivocal. Here the right of action was complete when the bill was unpaid upon presentment; and inasmuch as what was done was not in the nature of an alteration of the effect of the bill, I do not think that anything has been done which has the effect, in law, of discharging the defendant. There has been no attempted alteration of his liabilities, and no discharge; and this being so, I do not think that any explanation of the immaterial act was required. I therefore think that the appeal should be dismissed with costs.

WETMORE, J. I cannot agree. The drawing of the pen through the name of the drawer of a bill as effectually destroys the bill as if it was burnt. The plaintiff not having offered any evidence to explain the striking out of the name, I think the appeal must be allowed.

SIR JOHN C. ALLEN, C. J. With some doubt I agree that the appeal be dismissed.

PALMER and FRASER, JJ., not having heard the argument, took no part.

*Appeal dismissed with costs.*

CARNEY, ADMINISTRATRIX, v. THE CARAQUET RAILWAY  
COMPANY.

1890.

April 16.

*Railway Company—Negligent construction of Bridge—Liability for death of workman caused by the defect—Master and servant—Disobedience of orders of fellow-servant—Proximate cause of accident—Contributory negligence—Liability of master—Misdirection.*

In an action against a Railway Company to recover damages for the death of a workman in their employ, while being carried on one of their engines, it was proved that during the night preceding the accident, the ice in the river over which the bridge crossed had, in consequence of a heavy gale and high tide, been forced against the piers of the bridge, displacing some of them; by reason of which the engine broke through the bridge and the workman was killed.

*Held*, that the jury were properly directed, that the defendants were only bound in the construction of the bridge, to provide against dangers that could reasonably be foreseen by reasonable men in the exercise of ordinary sagacity; but if the bridge was so constructed that it was destroyed by a storm such as might reasonably have been anticipated to occur, the defendants would be liable.

Where there was evidence that the manager of the railway had directed the conductor of the train and the engine driver on the day of the accident, not to cross the bridge until it was examined, which order they disobeyed:—

*Held*, that as the conductor and the engine driver were the fellow-servants of the deceased, it should have been left to the jury to find whether their disobedience of the order was the proximate cause of his death. (FRASER, J., dissenting.)

Though a railway bridge is defectively constructed, yet if a person goes upon it contrary to directions, and with notice of the danger, and is injured, he cannot recover damages against the company for the injury. (FRASER, J., dissenting.)

This was an action brought by the widow and administratrix of John Carney, on behalf of herself and her infant children, under Consol. Stat., c. 86, to recover damages for the alleged negligence of the defendants, causing the death of her husband. Verdict for the plaintiff.

The material facts as they appeared at the trial, which took place before His Honor, Mr. Justice Fraser, at the Gloucester Circuit in September, 1888, will be found sufficiently stated in the judgments.

April 25, 1889. *Geo. G. Gilbert, Q. C.*, on behalf of the defendants, moved for a new trial on the ground of misdirection and non-direction. The learned Judge, was wrong in

1890.

CARNEY  
v.  
THE CARA-  
QUET RAIL-  
WAY CO.

directing the jury that the bridge was insufficient, and consequently the defendants liable, if it was not capable of resisting all the forces that might be brought against it, and that the extraordinary force that would relieve the defendants, must be one so overwhelming that no person could possibly have expected it. This charge is too strong in favor of the plaintiff. Although there might have been as high tides, and as great storms before, if this injury to the bridge was occasioned by the combination of these forces and the breaking up of ice, and such combination was unprecedented, and not reasonably to be anticipated, then there was not negligence in not providing for such unforeseen consequences. It is sufficient to prove that by no reasonable precaution could it have been prevented. The storm amounted to *vis major* or the act of God, and the defendants are not liable. *Nugent v. Smith* (1); *Nichols v. Marsland* (2); *Nitro-phosphate and Odam's Chemical Manure Co. v. London and St. Katherine Docks Co.* (3); *Blyth v. Birmingham Waterworks Co.* (4); *Cotton v. Wood* (5); *Withers v. North Kent Railway Co.* (6). Again, it appears that the accident was the result of the disobedience of the deceased's fellow servants to the positive orders and instructions of the defendants. Under these circumstances the jury should have been directed that it was immaterial whether the bridge was defectively constructed or not; and that the defendants were not liable for the damage which resulted from the negligence of a fellow-servant in the course of their common employment, if they thought the accident would not have occurred without the negligent disobedience of the conductor and driver. *Priestley v. Fowler* (7); *Searle v. Lindsay* (8); *Feltham v. England* (9); *Howells v. Landore Steel Co.* (10); *Brown v. The Accrington Cotton Spinning and Manufacturing Company* (11); *Tarrant v. Webb* (12); *Farwell v. The Boston and Worcester Ry. Co.* (13); *Griffiths v. London and St. Katherine Docks Co.* (14); *Ormond v. Holland* (15); *Senior v. Ward* (16); *Griffiths v. Gidlow* (17); *Durgin v. Munson* (18); *Smith v. Dowell* (19).

(1) 1 C. P. D. 423.

(2) 2 Exch. D. 1.

(3) 9 Ch. D. 508.

(4) 11 Exch. 781.

(5) 8 C. B. N. S. 508.

(6) 27 L. J. Exch. 417.

(7) 3 M. &amp; W. 1.

(8) 11 C. B. N. S. 429.

(9) L. R. 2 Q. B. 33.

(10) L. R. 10 Q. B. 62.

(11) 34 L. J. Exch. 208.

(12) 18 C. B. 797.

(13) 4 Metc. 48.

(14) 12 Q. B. D. 498.

(15) E. B. &amp; E. 102.

(16) 1 E. &amp; E. 385.

(17) 3 H. &amp; N. 648.

(18) 3 Allen 396.

(19) 3 F. &amp; F. 238.

1890.

CARNEY  
v.  
THE CARA-  
QUANT RAIL-  
WAY CO.

*Blair, A. G., contra.* It is clear from the evidence, that the jury could not have found any other way than they did. The evidence shews that the storm was not more extraordinarily severe than might reasonably have been expected. The fact that the bridge proved insufficient against the effects of a storm and a tide that might have been foreseen, renders them liable for negligence. If the jury had found for the defendants, this Court would have been bound to set the verdict aside, as being against the weight of evidence; and if the same evidence was submitted to another jury, they could not do otherwise than find for the plaintiff. In view of the strong evidence, the Court is entitled to refuse to disturb the verdict, even if the Judge's charge is not absolutely correct. But it is submitted that the direction to the jury is within the law as laid down in *The Great Western Railway Co. v. Fawcett* (1). It is decided in that case that a railway company, in the formation of their line, are bound to construct their works in such a manner as to be capable of resisting all violence of weather which, in the climate through which the line runs, might be expected, though perhaps rarely, to occur. See *Hastings on Torts*, 167-9. Non-direction is only a ground for a new trial where there has been a miscarriage on the part of the jury, and a verdict against the evidence has been produced. As to the non-liability of the defendants on the ground of the accident having occurred through the negligence of a fellow servant: The evidence shews that the defective construction of the bridge was the proximate cause of the accident. There was negligence or want of care on the part of the defendants, and they are responsible, even though there was also neglect of a fellow servant. *Smith on Negligence*, 67, 226-7; *Cayzer v. Taylor* (2).

*Gilbert, Q. C., in reply.*

*Cur. adv. vult.*

The following judgments were now delivered:

TUCK, J. All questions as to the improper admission and

(1) 9 Jur. N. S. 330.

(2) 10 Gray 274.

1890.  
CARNEY  
v.  
THE CARA-  
QUET RAIL-  
WAY CO.  
Tuck, J.

rejection of evidence were practically abandoned at the argument, and properly so, for they do not affect materially the principal points to be determined. These arise under two classes of objection to the charge of the learned Judge—misdirection and non-direction.

In this case, the widow and administratrix of the deceased, John Carney, claims that through the negligence of the defendants' company her husband lost his life in December, 1887. It is alleged in the declaration that John Carney was employed as a section man on the defendants' railway, and to enable him to perform his duty under this employment they undertook to carry him over a bridge on their line of railway, which bridge was, by the negligence and default of the defendants, constructed unsafely and of improper and defective materials, and was in an unsafe condition, and unfit to be used or crossed, which the defendants well knew, but of which Carney was ignorant. The plaintiff, by her counsel, contends that this statement of claim has been substantially proved. On the contrary, the defendants say that there is no proof of knowledge; that they have shown that the bridge was properly and securely built, but was displaced by the "act of God," and that Carney, the deceased, was guilty of contributory negligence.

Objection is made to the summing up of the learned Judge on two principal grounds: first, as to the question what amounts in law to an "act of God," and second, as to contributory negligence on the part of a fellow servant. A correct statement of the law as to what is usually termed an "act of God," appears to be, that a common carrier, or a company like this, is not liable for any accident as to which they can shew that it is due to natural causes, directly and exclusively, without human intervention, and that it could not have been prevented by any amount of foresight, pains and care reasonably to be expected from them. To make out negligence in the present case, there must have been an omission to do something which a reasonable and prudent man, guided by knowledge and experience as to winds, tides, ice and storms, and their effects, would have done. It is not necessary that the high tide should never have happened before; it is sufficient that the happening could not have been reasonably expected.



Having regard to the wind, ice and tide, which might occur in Caraquet bay, was the Little River bridge constructed in a manner to withstand whatever force from these causes, a reasonable and prudent man, with such knowledge and experience as he ought to possess, might expect to be brought against it. If the case was properly submitted to the jury, I think there was ample evidence to warrant them in coming to the conclusion that the bridge was not properly built.

There was evidence on behalf of the plaintiff to shew that on the 17th December, 1887, a train, consisting of a freight and passenger car, with a locomotive and snow plough ahead of it, left Caraquet for Bathurst. When near this bridge, the locomotive and snow plough were disconnected from the remainder of the train, and then went on the bridge at a high rate of speed. Almost immediately the locomotive fell through the bridge on the north side, and eight men were killed, John Carney among the number. There had been a gale of wind from the north-east. Irene Cormier says: "There was a heavy storm, and the tide had been very high; that he had seen heavier storms, and had known the tide to be just as high as that one; that it was an ordinary fall high tide." This witness was thirty-one years old, and lived about one hundred yards from the bridge. He says that he went to the bridge in the morning before the accident, and saw that some part of the bridge was misplaced during the night; that the top had been moved by ice, but the bottom remained. He had known a very high tide to give eight or nine feet of water at the bridge; that he could not say how high the tide rose on this occasion by the number of feet, but was what he called an ordinary high tide. In an ordinary tide, there are about seven feet of water at the bridge; when the tide is out, there are about six inches of water on the flat. The whole bridge was built with blocks and spans, about eight or nine spans. That the ballast was insufficient; the round logs were not bolted; the square timber was on top, just under the sleepers, and had been bolted; did not see any bolts below that. He assisted in building the new bridge. A large quantity of ballast was put in it—sometimes eighty loads a day—and the new bridge was bolted. Marcel Legere worked at the bridge when first

1890.

CARNEY  
v.  
THE CARA-  
QUET RAIL-  
WAY Co.  
Tuck, J.

1890.  
CARNEY  
v.  
THE CARA-  
QUET RAIL-  
WAY CO.  
Tuck, J.

built. He did not put in any bolts, or see any put in, until they got to the top course of timber; the square timber was above the round logs; the stringers were bolted to the square timber, and the sleepers were on top of the stringers; there was a tier of square timber, then stringers, and then sleepers; the square timber was laid crosswise, and the stringers lengthwise. A little stone was put in the piers — not very much; some blocks might have more than a foot of stone. The bridge was about four hundred feet long, and about twenty feet high from the bed of the river to the highest point. The bridge required ballast to keep it from floating; if ballasted it would be stronger for the weather, but not for the train. The ice did not seem to have been broken — it moved all in a block. A number of other witnesses gave evidence as to the small quantity of ballast used, and the insufficiency of the bolting. Xavier Cormier says that he had often seen as heavy storms, and had seen the tide higher; that he went down to the bridge the morning before the accident, and thought the ice and wind had moved it to the south. Hon. Robert Young speaks of a bridge at Caraquet harbor, where the cribwork was bolted and filled with stone. It was twelve hundred feet out into the harbor, and has withstood severe storms, ice and tides for eight or nine years; he remembers a pier, a half-mile from it, not ballasted, which was carried away by the ice. Alfred Haines, a practical bridge builder for thirty-four years, who had built bridges on the New Brunswick, Western Extension, and Northern and Western railways, says that a bridge of this kind should be bolted in every tier and thoroughly ballasted.

For the defence there was evidence that there was a heavy gale and the tide was a foot higher than an ordinary tide in stormy weather, and there had been no tide quite so high in twenty-five years. One witness says that the tide was from two and one half feet, to three feet higher than he had ever seen it before. Other witnesses speak of the unusually high tide on the occasion. William Branch, Charles Hache and Simon Quinn say they hauled stone to the bridge for ballast. William Walsh, a bridge builder, thought the bridge sufficient for the locality. Arcade Landry, who built the bridge, under

Denis London, describes how it was built, and thought it good for all purposes. William H. Chisholm, superintendent of the company's railway, and a railroad man for nineteen years, from his experience thought the bridge sufficiently ballasted, and entirely safe; that the vibration was less than ordinary, and there was no yielding under heavy trains; he could not see that ballast adds at all to the strength of a bridge. Kennedy Burns, the manager of the road and one of the company, and who was contractor for building it, says that the bridge was first passable for trains in October, 1886; that Rideout, an engineer for the government of Canada, Maxwell and Beckwith engineers for New Brunswick, were over the road twice and inspected it; that the bridge was well built, and the wood-work was good, sufficient and substantial; that Lannergan, the engine driver, Dan Kearney (the conductor), and Carney, the deceased, were all employees of the company.

This is a fair synopsis of all the evidence on both sides, relating to the ice, tides and storms, and the manner in which the bridge was built.

I have no doubt, and I think no person who reads this evidence, can have any doubt that if the bridge had given way whilst a train with passengers had been crossing over it, the railway company would have been liable in law for all damage which resulted; and that liability would have arisen because the bridge had been insecurely and insufficiently built. There was no "act of God," or *vis major* about it. The bridge yielded and gave way when there came more ice, a higher tide and a greater storm than usual, but not greater nor higher than a person living in that section of the country, might reasonably expect would come. No immense natural force was brought into exercise, and there was nothing in the tide or storm of that night, that might not have been foreseen, and for which provision could not have been made. It is the common everyday talk of many persons in this country, whenever a heavy storm of wind or rain or unusual freshet occurs, "oh! that is the greatest storm or freshet we have ever had in this country." When in truth, within five, ten or fifteen years, there have been as great, if not greater ones.

There is another disposition, equally common, to blame

1890.

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CARNEY  
v.  
THE CARA-  
QUEST RAIL-  
WAY CO.

---

Tuck, J.

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1890.

CARNEY  
v.  
THE CARA-  
QUEST RAIL-  
WAY CO.  
Tuck, J.

nature for what is really the fault of man. It is not uncommon for witnesses to give an exaggerated account of an occurrence, for the side which calls them; and it is likely that this case does not differ from many others in that respect. Such men as Messrs. Chisholm, Landry and Walsh believed that theoretically, this was a proper bridge to build; practically, when the heavy storm and high tide came and forced the ice against it, it proved a failure.

If, on the evidence, the jury had a right to find that the bridge was improperly and negligently built, then, if the defendants did not know it when they employed Carney, they ought to have known it. Burns, their manager and president, and the original promoter of the company, was the contractor who constructed the road. At the trial he gave evidence that the bridge was well built, and the woodwork was good, sufficient and substantial. When it is said that there is no evidence that the defendants knew the bridge was unsafe and negligently built, it must be meant that they blinded their eyes to what was patent to any practical man who knew the facts, and gave the subject attention. If they did not know, they had means of knowledge. Upon the supposition that the bridge was insecurely constructed to their knowledge, they would be liable for any damage a servant might sustain by reason of this insecurity, if they took him into their employ, and did not tell him of the insecure condition of the bridge. But if, with full knowledge that the bridge was unsafe, he chose to enter their service and sustained injury, the company would not be liable, for the maxim *volenti non fit injuria* would apply.

This being a correct conclusion as to the facts, should there be a new trial on the first question, that is the "act of God," because of misdirection or non-direction by the learned Judge? It may be that some of the statements in the charge, when taken by themselves, are too strong on this point, but when looked at as a whole I think the jury was not misled. The extraordinary risk, of which the servant must have notice, to which reference is made in the charge was that to be taken in crossing an unsafe bridge. In the stenographer's notes of the charge I find the words, "It is for you to say whether that

bridge, constructed in the way the defendants claim it was constructed, whether that was a proper and safe and sufficient bridge to resist the pressure of all the forces that might be brought to bear against it." But immediately afterwards are the following words: "When I say all the forces that might be reasonably expected to come against it, I do not refer to unprecedented forces—to a force of so extraordinary a character, so overwhelming that no one could properly have expected it."

1890.

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CARNEY  
v.  
THE CARA-  
QUET RAIL-  
WAY Co.

---

Tuck, J.

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In another part I find this language: "Then you will determine the question whether you think the bridge was a good structure, sufficient for any reasonable storms that might be anticipated; and if you think it was, say that you think it was a good, sufficient bridge." And then later on the Judge says, "yet unless the storm was an unprecedented one, if you think that the bridge was not built to resist storm that might have been anticipated, then you will say so, and come to the conclusion that the bridge was not properly built." The language is strong, but amounts to little more than if the learned Judge had said that the company had been guilty of negligence, unless they had built the bridge so that it would resist all force of storm, ice, wind and tide, which a prudent, careful and intelligent man, guided by the experience of nature's forces in that locality, might reasonably anticipate would come against it. The probability is that the jury understood the Judge's language better than this, and were in no way misled, but concluded that the bridge was not properly built. For the learned Judge says in another place, "If you come to the conclusion that this bridge was, for reasons I have already stated, an unsafe and improperly constructed bridge, that is, not constructed in such a way as would have resisted the forces that might reasonably have been anticipated to come against it; if they constructed their work so that it would be safe and sufficient against everything except an unreasonable flood, they would be relieved from action. But if they did not take the care to provide for such accidents as men of ordinary capacity would reasonably anticipate and look forward to, they would render themselves responsible."

In dealing with the Judge's direction on this branch of the case, I have expressed my views upon the point of non-direc-

1890.  
 CARNEY  
 v.  
 THE CARA-  
 QUET RAIL-  
 WAY CO.  
 Tuck, J.

tion, and also as to the verdict being against the weight of evidence. When treating of non-direction, it is held by the Judicial Committee in *The Great Western Railway Company v. Fawcett* (1), that a defence to an action against a Railway Company for damage sustained by reason of the want of skill in the construction of a railway, that the accident was caused by a storm of such an extraordinary nature, that no experience could have anticipated its occurrence, is a circumstance that, as affecting the question of negligence in the construction and maintenance of the railway, ought to have been left by the Judge distinctly and pointedly to the jury; but the Judicial Committee, notwithstanding the omission of such direction, satisfied with the verdict, refused to grant a new trial, adopting the rule of the Court of Exchequer, laid down in *Ford v. Lacy* (2), that non-direction is only a ground for granting a new trial, where the verdict is against the weight of evidence.

But there is another and most important question, which has to be considered. Even supposing there was negligence on the part of the company in constructing the bridge, are they relieved of liability in the present case by reason of contributory negligence on the part of the conductor and engine driver, who were fellow servants of the deceased, John Carney? It is claimed by the defendants, that Chisholm, the superintendent of the road, gave orders to the conductor and driver as to crossing the bridge, and that disobedience of those orders by them, was the proximate cause of Carney's death. In directing the jury upon this point, the learned Judge said: "If you come to the conclusion that the bridge was not properly constructed, then the plaintiff would be entitled to recover, although Chisholm may have given directions, as he stated he did, to the conductor and driver of the train; although he gave directions to these parties, still there would be a responsibility upon the company, by reason of the original negligence in the construction of the bridge." The defendants say that this charge was wrong in law, and that the direction should have been, that a master is not liable to his servant for damages resulting from the negligence of a fellow servant in the course of their common employment, and if they thought the

(1) 1 Moo. P. C. N. S. 101.

(2) 7 H. & N. 151; 30 L. J. Ech. 352.

accident would not have occurred, without the negligent disobedience of the conductor and driver—fellow servants—then the company would not be liable. I think that this, or something like it, would have been the proper direction, and that the other direction was wrong.

There was evidence as to the orders given by Chisholm. Gilasse Cormier says: "On the 17th December, the conductor was Dan Kearney and the engineer was Michael Lannergan; they and Chisholm were at the station." He said to the driver: "As I said before, before we come to the bridge, we will stop to look over it." Dan answered, "Yes sir," or "all right sir." Ambrose Cormier says: "I was at Caraquet station. Heard Chisholm say to conductor Kearney, stop at this side of the bridge and look at the bridge." He answered, "all right." This evidence was first given in the French language; he repeated it in English.

Philip Bullard says, that he lives in Caraquet and was at the station: "I heard, before the train started, Chisholm telling Lannergan and Dan Kearney to stop at the eastern side of the bridge, where the curve was, and to send two men ahead to look if the bridge was good for the train to pass on. Lannergan sung out, "all right, sir, I will do so."

Hypolite Foulhan says: "When Chisholm got off the train, he said to Dan Kearney, to stop before they went on the bridge and let the trackmen go ahead and see. I was on the engine at the time. Kearney said, 'all right.'"

Chisholm, himself, upon the question of orders says: "I told the section foreman that he should be particular to have the public road crossing flanged when the snow packed. When he asked for further directions, I said the train will stop on the embankment at the east end of the bank, and you will go ahead and clean the crossing at the west, and you will examine the bridge at the same time. I told the engine driver and Conductor Kearney together, that the driver should stop on the embankment on the east end of the bridge; the section men would go ahead and look over the bridge. The deceased Kearney was in the discharge of his duty at the time." This is all the evidence bearing upon the orders.

It is difficult to reconcile the statements of the other wit-

1890.

CARNEY  
v.  
THE CARA-  
QUET RAIL-  
WAY CO.

Tuck, J.

1890.  
 CARNEY  
 v.  
 THE CARA-  
 QUET RAIL-  
 WAY Co.  
 Tuck, J.

nesses with that given by Chisholm, or with each other. Unless he gave the orders at different times and places (of which he himself says nothing) there are five persons who give a different account of the same transaction, both as to place and what was said. It may be argued that this shows there was no concert between the parties as to what they should tell. In my opinion it proves nothing of the kind. For if it were possible to believe that this story was manufactured, it would be equally easy to believe that it was agreed that each witness should vary the account, in order to avoid suspicion. However this may be, I consider it not a little singular that trusty men, as were the conductor and driver, should, within ten minutes after receiving instructions, deliberately disobey them. They cannot deny this imputation upon their faithfulness, for they lost their lives when the locomotive went down. But there was the evidence, and it should have been left to the jury to say whether or not the conductor and driver disobeyed Chisholm's orders in attempting to cross the bridge? Then, was their disobedience of those orders the proximate cause of the accident? Had both these questions been put and answered in the affirmative, the verdict should have been for the defendants.

Among the earliest cases on the subject of the liability of the master for injury to the servant whilst acting in his employment, is *Priestley v. Fowler* (1). There it was held that the master was not liable for damage to his servant received whilst driving, from an imperfection in a carriage, which was unknown to the master. The very point involved in this case is decided in *Hutchinson v. The York, Newcastle & Berwick Ry. Co.* (2). There Alderson, B., in delivering judgment says: "The difficulty is as to the principle applicable to several servants employed by the same master, and injury resulting to one of them from the negligence of another. In such a case, however, we are of opinion that a master is not in general responsible when he has selected persons of competent care and skill. The principle is that a servant, when he engages to serve a master, undertakes as between him and his master to run all the ordinary risks of the service, and this includes the risk of negli-



gence on the part of a fellow servant, whenever he is acting in discharge of his duty as servant of him who is the common master of both." In *Wigmore v. Jay*, in the same book, Pollock, C. B., says: "We are of opinion, on a very full consideration of the case of *Hutchinson v. The York, Newcastle & Berwick Ry. Co.*, which has been delayed for some time to give the subject the fullest consideration, that no such action lies."

The doctrine laid down in these cases has never since been questioned.

In *Feltham v. England* (1), it is held that "the rule that a master is not liable to a servant for injuries sustained by a fellow servant in their common employment, is not altered by the fact that the servant guilty of negligence is a servant of superior authority, whose lawful directions the other is bound to obey." Nor do I think that the rule is altered in the present case, although the defendants were guilty of negligence in building the bridge, if the direct cause of Carney's death was disobedience of orders by fellow-servants whilst they were acting in their common employment. There was nothing here to shew that the conductor and engine driver were incompetent or improper persons to be employed in their respective capacities, or that due care was not shown in their selection. See *Morgan v. The Vale of Neath Ry. Co.* (2), *Durgin v. Munson* (3), and *Farwell v. Boston and Worcester Ry. Co.* (4).

From the summing up on this part of the case, the learned Judge seems to have been of the opinion that, if there was negligence on the part of the defendants in constructing the bridge, the disobedience of orders by the conductor and engine driver did not affect Mrs. Carney's right to recover. In this, with great respect, I think the learned Judge was wrong. The question whether the orders were given, and the death of Carney was the direct result of their disobedience, should have been left to the jury, although the defendants had been guilty of negligence. If the evidence that Chisholm gave the orders is true, then it follows that if the proximate cause of John Carney's death was the disobedience of the superintendent's orders by the conductor and driver, the company is not liable

1890.

CARNEY  
 v.  
 THE CARA-  
 QUET RAIL-  
 WAY CO.  
 Tuck, J.

(3) L. R. 2 Q. B. 23.  
 (2) L. R. 1 Q. B. 149.

(3) 9 Allen 396.  
 (4) 4 Metc. 49.

1890.

CARNEY  
v.  
THE CARA-  
QUET RAIL-  
WAY CO.

—  
Tuck, J.  
—

for their negligence, because they stood in the relation of fellow servants to the deceased Carney.

In my opinion, because the jury was not asked to find on this part of the case, there must be a new trial.

KING, J. This action is brought by the widow and administratrix of John Carney, on behalf of herself and her infant children, to recover damages for the alleged negligence of the defendants, causing the death of her husband. Carney was a section man employed on defendants' railway. He usually worked on a section near the Bathurst end of the road; but on the occasion in question, he was taken down with other hands, to the lower end of the line, in consequence of that part of the road being blocked by heavy snow drifts. The train reached Caraquet on its downward journey, on Friday evening, December 16th. It remained there over night and the the next morning proceeded down to Shippegan and returned to Caraquet. In the night there had been a heavy gale accompanied with an unusually high tide, and the wind and tide had moved the ice in places along the coast. A short distance above Caraquet, there was a railway bridge at a place called McIntosh's Cove. This bridge was safely passed over on the Friday evening. During the night the ice had been pushed up against it by the combined action of the gale and the tide, and had shoved several of the piers of the bridge (which was built on cribs), out of their place, leaving the stringers and the track above them, unsupported. When the train on its way up from Caraquet reached a point about a half mile from the eastern end of the bridge, it stopped, and the engine, snow plough and tender were detached from the van and passenger car in the rear. A number of the workmen (Carney among them) left the van and went upon the engine; and, leaving the van and passenger car behind, the engine started for the bridge, with the apparent object of crossing it at a high rate of speed and forcing the plough through a cutting that was filled with snow, a short distance to the westward of the bridge. When the engine reached the part of the bridge where the piers had been carried away,

the bridge gave way, and the engine fell through and a number of persons (Carney included) were killed.

It was contended for the plaintiff that the bridge was defectively constructed. The piers were of crib work and were about 18 feet high. They were ballasted for a distance of about eight feet from the bottom, and above that there was no ballast. It was also shown that the logs in them were bolted only to about the same height, and that above this height, the logs were kept in place only by notches and by the weight of the material and the track. The height at which the piers were ballasted and bolted corresponded with the usual height of the tide. The bridge was built under the supervision and direction of a Mr. Chisholm, who had had some experience in railroad building.

The learned Judge told the jury that the defendants were bound to take reasonable care of their servants, and that the bridge should be sufficient to resist all the forces that might reasonably be anticipated to be brought against it. And he further told them that if the bridge was sufficiently constructed to resist all such forces, and gave way only to a force that could not reasonably have been anticipated, this would be what is called the "act of God," and the defendants would not be responsible. The learned counsel for defendants has picked out several passages in the charge where the duty of the defendants is stated otherwise than above. Thus the learned Judge says: "I tell you this, gentlemen, that in order to relieve the company from responsibility upon that point, that the storm, although it may have been unusual, although such a storm may not have occurred for twenty-five or thirty years before, if it was not an unprecedented storm, it would not come within the meaning of the 'act of God,' so as to relieve the company from responsibility." And no doubt if this stood alone, or if (although not standing alone), it was so emphasized as that the jury may fairly have thought that it contained in itself a complete test of liability, I should think defendants' objection should prevail; for the true test is not whether or not the storm was unprecedented, but whether it could reasonably have been anticipated. *Nichols v. Marsland* (1).

1890.

CARNEY

v.

THE CARA-  
QUET RAIL-  
WAY CO.

King, J.

1890.

CARNEY  
v.  
THE CARA-  
QUET RAIL-  
WAY CO.

King, J.

But the passages in the charge prior to that cited, and subsequent to it, which put the test in the proper way are so numerous and explicit that I think there can be no doubt but that the jury fully understood it. They would be very stupid if they did not. To cite a passage near the close, the learned Judge says: "Now there is no doubt that the company were only bound to provide in the construction of this bridge against dangers which could reasonably be foreseen. Now could this have been reasonably foreseen—the action of these winds, this tide and ice? If it could, then they would be guilty of negligence; because they would be guilty of negligence if they did not secure their track against dangers which could be foreseen by reasonable men in the exercise of ordinary sagacity. If they constructed their work so that it would be safe and sufficient against everything except an unreasonable flood, they would be relieved from action. But if they did not take care to provide for such accidents, as men of ordinary sagacity would reasonably anticipate and look forward to, unless they adopted all these measures then, certainly, they would be in a position to render themselves responsible in this matter." And again, near the close of the charge: "If you come to the conclusion that the bridge was not properly constructed, and that in consequence of that it was carried away, and that this storm was not of such a character as to fall within the definition of an 'act of God,' but was such a storm as these parties might have reasonably anticipated would have taken place, and this force was brought to bear against the bridge which was destroyed because of defective construction against storms that might reasonably have been anticipated, then you will find your verdict for the plaintiff."

The remarks of Bramwell, L. J., in *Clark v. Molyneux* (1), are very much in point as to these objections to the charge.

The defendants, however, set up another defence upon the trial, viz.: that the superintendent of the road (Chisholm), who was on the train at the time, had directed the engine driver and conductor to stop the train at the eastern embankment of the bridge, in order to look the bridge over; and that, this order having been disobeyed, the accident was immediately and

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(1) 3 Q. B. D. 227.

proximately caused by the negligence of a fellow-servant of the deceased.

1890.

CARNEY

v.

THE CARA-  
QUET RAIL-  
WAY CO.

King, J.

In *Bartonshill Coal Co. v. Reid* (1), Lord Cranworth says: "When the workman contracts to do work of any particular sort, he knows or ought to know, to what risks he is exposing himself; he knows, if such be the nature of the risk, that want of care on the part of a fellow workman may be injurious or fatal to him, and that against such want of care his employer cannot by any possibility protect him." In such case however the servant causing the injury must be one who is competent to discharge his duty, otherwise the master is not relieved of liability.

In *Hough v. Railway Co.* (2), the Supreme Court of the United States say: "It is undoubtedly true, that the general doctrine of the immunity of the master from responsibility for injuries received by his servant from a fellow-servant in the same employment has, in some cases, been carried much further by the English than by the American Courts."

In *Clarke v. Holmes* (3), Byles, J., says: "The owner of dangerous machinery is bound to exercise due care that it is in a safe and proper condition. The master is neither on the one hand at liberty to neglect all care, nor on the other is he to insure safety, but he is to use due and reasonable care." This case is called in *Hough v. Railway Co.* "an instructive case." In it plaintiff, employed by defendant to oil dangerous machinery, had complained of the condition of the machinery, and the manager of defendant, in latter's presence, promised that the fencing should be restored. The servant was injured by the machinery in consequence of its being unfenced.

Cockburn, C. J., said: "When a servant is employed on machinery, from the use of which danger may arise, it is the duty of the master to take due care, and to use all reasonable means to guard against and prevent any defects from which increased and unnecessary danger may occur. The rule I am laying down goes only to this, that the danger contemplated on entering into the contract shall not be aggravated by any omission on the part of the master to keep the machinery in

(1) 4 Jur. N. S. 799.

(2) 100 Otto 213.

(3) 7 H. &amp; N. 937.

1890.

CARNEY  
v.  
THE CARA-  
QUET RAIL-  
WAY CO.

King, J.

the condition in which, from the terms of the contract or the nature of the employment, the servant had a right to expect that it would be kept."

In *Durgin v. Munson* (1), the plaintiff in the employ of the defendant had charge of turning engines upon a turn-table, and while doing so, an engine ran off and caused the injury complained of. The engine ran off in consequence of a defective brake. *Held*, that defendant was entitled to show that the person who had charge for him of all the engines on the road had given instructions to the engineers before the accident to have the wheels of their engines chocked while turning on the turn-table; and that the accident occurred from the failure of some servant of the defendant to obey such instructions, although such instruction was not known to the plaintiff. Hoar, J., says: "To entitle plaintiff to recover, he was bound to show that the engine was defective, and that the defendant knew, or in the exercise of ordinary care would have known, that it was defective. But the exception taken to the exclusion of the evidence is a material one, and in our opinion well founded. \* \* \* The defects of the engine in the abstract were not the gist of the plaintiff's complaint, but the defects at the time, and for the service in which the defendant allowed it to be used when it ran on to the plaintiff. If it were fit and sufficient for use in the manner in which the defendant then allowed it to be used, its insufficiency for other services at other times would not concern the plaintiff. Now, it is plain that a machine may be safe and fit for one use when it is not for another. To put an extreme case, by way of illustration: Suppose the defendant had a worn-out engine, unfit for any service, and he had given orders that it should not be run at all; yet some workman had, without his knowledge, undertaken to run it; could the master be held responsible to the servant? \* \* \* The fact that the orders to the engineers were not known to the plaintiff would not be decisive, because the question on that part of the case was whether the engineers were careless, and by their failure to obey instructions the accident occurred."

A leading case upon the question is *Ford v. Fitchburg R'y Co.*

(1). That was an action by an engineer to recover damages for injuries caused by the explosion of his engine, which was old and out of repair. His right to recover was disputed upon the ground that the want of repair of the engine was due to the negligence of fellow-servants in the department of repairs. But the Court said: "The rule of law which exempts the master from the responsibility to the servant for injuries received from the ordinary risks of his employment, including the negligence of his fellow-servants, does not excuse the exercise of ordinary care in supplying and maintaining proper instrumentalities for the performance of the work required. One who enters the employment of another has a right to count on this duty, and is not required to assume the risks of the master's negligence in this respect. The fact that it is a duty which must always be discharged (when the employer is a corporation) by its officers and agents, does not relieve the corporation from that obligation. The agents who are charged with the duty of supplying safe machinery are not, in the true sense of the rule relied on, to be regarded as fellow-servants of those who are engaged in operating it. They are charged with the master's duty to his servant. They are employed in distinct and independent departments of service, and there is no difficulty in distinguishing them, even when the same person renders service in each, as the convenience of the employer may require."

1890.

CARNEY  
v.  
THE CARA-  
QUET RAIL-  
WAY CO.  
King, J.

In *Albro v. Agarwam Canal Co.* (2), it was held that a laborer employed in constructing the railroad bed and not engaged in any duty connected with running the train, was a fellow servant with one running the trains.

In *Cayzer v. Taylor* (3), it was held that a master is liable to his servants for injuries resulting from a defect in his machinery; although the negligence of a fellow servant contributed to the accident. In that case the action was by a servant injured by explosion of a boiler, and it was charged that defendant had provided an insufficient boiler, and knowingly did so.

The Court say: "The next ground of exception upon which defendant relies, is the refusal to instruct the jury that

(1) 110 Mass. 240.

(2) 6 Cush. 75.

(3) 10 Gray 274.

1890.  
 CARNEY  
 v.  
 THE CARA-  
 QUEST RAIL-  
 WAY CO.  
 King, J.

if the accident would not have happened without negligence on the part of the engineer, the defendant was not liable. We think such instruction could not have been given. The default of the defendant might have been, not only in having a boiler imperfectly constructed and guarded, but an incompetent and habitually careless and negligent engineer. It is now well settled law, that one entering into the service of another, takes upon himself the ordinary risks of the employment in which he engages, including the negligent acts of his fellow workmen in the course of the employment. *Farwell v. Boston & Worcester R'y.* (1). It has not been settled that the master is not liable for an injury which results from the employment of an incompetent servant or use of a defective instrument. If the defendant employed a competent engineer and used a boiler properly constructed and guarded, he would not be liable for injuries resulting from an act of carelessness or negligence of such engineer. But we are not prepared to say that if one uses a dangerous instrumentality without the safeguards which science and experience suggest, or the positive rules of law require, he is not to be responsible for an injury resulting from such use, because the negligence of one of his servants may have contributed to the result, or because a possible vigilance of the servant might have prevented the injury. \* \* To say that the master should not be responsible for an injury which would not have happened, had a safeguard, required by law, been used [as was the case there], because the engineer was negligent, would be to say in substance and effect, that he should not be liable at all for an injury resulting from the failure to use it."

In *Wigmore v. Jay* (2) the defendant, a master builder, having contracted to build a certain building, employed W. as a bricklayer. The scaffolding was erected under superintendence of defendant's foreman — defendant not being present — and was constructed by men in the employ of defendant, who used an unsound ledger pole, in consequence of which the scaffold broke while W. was at work upon it. The unsoundness of the pole had been previously pointed out to the foreman. *Held*, that no action could be maintained against defendant under

(1) 4 Metc. 49.

(2) 5 Arch. 262.



Lord Campbell's act, there being no evidence that the foreman was an improper person to employ for that purpose.

In *Hutchinson v. York, Newcastle & Berwick Ry. Co.* (1), it was held that a master is not responsible to his servant for injury occasioned by the negligence of a fellow-servant in the course of their common employment, provided the latter be a person of competent care and skill. Therefore, where a servant of a railway company, in discharge of his duty as such, was proceeding in a train under the guidance of others of their servants, through whose negligence a collision took place and he was killed, it was held that his representative could not maintain an action, and that it made no difference in this respect whether the accident was occasioned by the negligence of the servant guiding the train in which deceased was, or those guiding the other train or of both.

Alderson, B., says: "The principle is that a servant, when he engages to serve a master, undertakes as between him and his master to run all the ordinary risks of the service, and this includes the risk of negligence on the part of a fellow-servant whenever he is acting in discharge of his duty as servant of him who is the common master of both. Though we have said that a master is not in general responsible to one servant for an injury occasioned to him by a fellow-servant while they are acting in one common service, yet this must be taken with the qualification that the master shall have taken due care not to expose his servant to unreasonable risks. The servant, when he engages to run the risks of his service, including those arising from the negligence of fellow-servants, has a right to understand that the master has taken reasonable care to protect him from such risks, by associating him only with persons of ordinary skill and care."

In *Brown v. Accrington Cotton Spinning and Manufacturing Co.* (2), it was held that a workman cannot recover from his employers for injury sustained while at work on their mill, resulting from the building having been originally negligently constructed, unless personal negligence be proved against the employers themselves (or against some person acting by their orders), either in having given directions how the

1890.

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CARNEY  
v.  
THE CARA-  
QUET RAIL-  
WAY CO.  

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King, J.

(1) 5 Exch. 243.

(2) 34 L. J. Exch. 208.

1890.  
 CARNEY  
 v.  
 THE CARA-  
 QUET RAIL-  
 WAY CO.  
 King, J.

building should be constructed, or in having reason to suppose that the person to whom they entrusted the charge of doing the work was not a person competent to do the work.

In *Feltham v. England* (1), it was held that the rule that a master is not liable to a servant for injuries sustained from the negligence of a fellow-servant in common employment is not altered by the fact that the servant guilty of negligence is a servant of superior authority, whose lawful directions the other is bound to obey.

The defendant was a maker of locomotive engines and plaintiff was in his employ. An engine was being hoisted for the purpose of being carried away by a travelling crane moving on a tram-way, resting on beams of wood supported by piers of brick work. The piers had been recently repaired and the brick work was fresh. The defendant retained the general control of the establishment but was not present. His foreman or manager directed the crane to be moved on, having just before ordered plaintiff to get on the engine to clean it. Plaintiff having got on the engine the piers gave way. The engine fell and plaintiff was injured. This was the first time the crane had been used and the plaintiff employed in this manner. It was held that there was no evidence to fix defendant with liability, for that assuming the foreman to have been guilty of negligence on the present occasion, he was not the representative of the master so as to make his acts the acts of the master. He was merely a fellow-servant of plaintiff, and there was nothing to show that he was not a fit person to be employed as foreman, neither was there any evidence of personal negligence on the part of defendant, as there was nothing to show that he had employed unskilled or incompetent persons to build the piers, or that he knew or ought to have known that they were insufficient.

As to contributory negligence see *The Bernina* (2).

In *Patterson on Railway Accident Law*, p. 337, it is said: Where the negligence of the railway in supplying defective appliances is the proximate cause of injury to a servant, it is no defence to the railway that the negligence of a fellow-servant concurred in causing the injury: citing amongst other

(1) L. R. 2 Q. B. 58.

(2) 12 P. D. 56.

causes *Grand Trunk Railway Co. v. Cummings* (1), *Lawless v. C. R. R.* (2), *Elmes v. Locke* (3). Nor is it a defence to the railway that the injury was caused by the negligence of a fellow-servant of the injured person concurring with the railway's proximate negligence in sending out a train with an inadequate force of train hands: citing *Booth v. Boston & Albany R. R.* (4).

1890.  
 CARNEY  
 v.  
 THE CARA-  
 QUET RAIL-  
 WAY CO.  
 King, J.

But where the negligence of a fellow-servant is the proximate cause of injury to a servant, the concurrence of negligence on the part of the railway, either in supplying the defective appliances or in failing to provide an adequate force of servants, will not render the railway liable for the injury: citing *Pease v. C. & N. Ry. Co.* (5); *Harvey v. N. Y. C. & H. R. R.* (6).

This, I think is the case here, or rather there is evidence of such being the case which should have been left to the jury. If the engine had not crossed the bridge the condition of the bridge would have worked no injury. Although defendants' bridge may have been notoriously bad, they had a right to say that they would not use it. It is the improper use of the bridge that caused the injury. Suppose defendants had closed the approach to the bridge with a chain, or by other physical means, could it be said that they would be responsible if a servant were to remove the bar or chain and take a train across whereby a fellow-servant sustained injury? It would not in such case be their having a defective bridge which would be the direct and efficient cause of the injury; but the direct and efficient cause would be the act of the person who took the train across. In such case the defendants could not interfere by any act of their own between the negligent act of the servant and the result. Here there was, indeed, no physical obstacle placed to prevent use of the bridge.

But there is evidence of a direction not to use the bridge. That may have been an inadequate notice under the circumstance, or it may (as argued by the *Attorney General*) not have been given in fact; but that was for the jury. It is because it was not left to the jury, and because I think that the proximate cause of the accident (if the order was given

(1) 106 U. S. 700.

(2) 136 Mass. 1.

(3) 136 Mass. 575.

(4) 73 N. Y. 32.

(5) 61 Wisc. 163; 17 Am. & Eng. R. R. Cas. 527.

(6) 38 N. Y. 481; 8 Am. & Eng. R.R. Cas. 515.

1890.  
CARNEY  
v.  
THE CARA-  
QUET RAIL-  
WAY CO.  
King, J.

and was adequate) lay in the act of the fellow servant that, I think, there should be a new trial. Because the company build an insufficient bridge, they are not to be liable to a suit if a fellow-servant uses the bridge contrary to their orders, and injures the servant.

WETMORE, J. I also have arrived at the conclusion that there should be a new trial. The ground I go upon is this, that the evidence being that the accident happened by reason of the negligence, or rather by the disobedience of an order given by the employer, the manager of a railway concern, that when there is an injury to a fellow servant, the company are not responsible. Here there is the evidence of three or four persons (whatever weight the jury may have given to it) that certain precautions were taken to see if the bridge was reasonably safe to go over; and it appears that a very fierce storm had occurred, which created a suspicion in the manager's mind, and therefore it was but reasonable that he should give the order he did to the deceased and his fellow servants, and if the orders had been obeyed, the train would not have gone over it as it did. I think there was sufficient evidence given and sufficiently ample evidence submitted, that the order was given; and if that order was obeyed, the accident would not have happened; and the inference being here that the jury had not that matter under consideration at all, I think there must be a new trial.

SIR JOHN C. ALLEN, C. J. I agree, for the reasons given, that there should be a new trial.

FRASER, J. I still think I was correct in my direction to the jury, and that they fully considered the whole evidence.

PALMER, J., not having heard the argument, took no part.

*New trial granted.*

## McMANUS v. WELLS.

1890.

April 16.

*Sheriff—Action for escape—Measure of damages—Evidence—Statement of debtor as to alleged fraudulent conveyances—Admissibility of—Arrest after action brought—Before whom affidavit sworn—Consol. Stat., c. 38, sec. 2—Necessary allegations in affidavit.*

In an action against a sheriff for an escape, the jury in assessing the damages may take into consideration not only the defendant's own resources, but all reasonable probabilities founded on his position in life that the debt would have been discharged. Per KING, J.

In such an action the admissions of the debtor before his escape as to the fraudulent character of certain conveyances made by him are admissible.

But the declarations of the grantee on that subject are not admissible. (TUCK, J., dissenting.)

An affidavit to hold to bail after the commencement of an action by writ of summons and before judgment, may be sworn before the plaintiff's attorney. (ALLEN, C. J., *dubitante*).

Such affidavit need not state the reasons for the deponent's belief that the defendant is about to leave the Province.

Where a verdict was obtained in the action against the escaped debtor before his arrest under cap. 38, Consol. Stat., the affidavit to arrest him should state, as the cause of action, the claim for which the action was brought against the debtor.

Though the affidavit to hold to bail may be irregular, it is not a defence to an action against the sheriff for an escape from arrest under the *capias* issued upon it.

This was an action against the Sheriff of the County of Albert for an escape.

The declaration stated that Joseph C. Blakeney was indebted to the plaintiff in the sum of one thousand dollars for goods sold and delivered; that the plaintiff brought an action against Blakeney in the Supreme Court, by writ of summons, for the recovery of the said debt; and after the commencement of the action, and before the signing of judgment therein, the plaintiff, according to the statute in such case made and provided, sued out of the said Court in the said action a writ of *capias*, in the form No. 6, in schedule (A) to cap. 37 of the Consol. Stat., directed to the Sheriff of the County of Albert (setting out the *capias* and endorsements, and alleging the arrest and escape); whereby and by reason of the premises the plaintiff was and is delayed in the recovery of his said debt and the costs, and is liable to lose the same. And the plaintiff claimed \$2,000 damages.

1890.  
McMANUS  
v.  
WELLS.

The defendant pleaded: 1. Not guilty; and 2. That the plaintiff did not sue out a writ of *capias*, as alleged.

At the trial, which took place before His Honor the Chief Justice, at the Albert Circuit in July, 1888, it appeared that the plaintiff had obtained a verdict for \$1,000 against Blakeney, and that the *postea* therein was stayed. After the verdict, and before judgment, the plaintiff caused a *capias* to be issued, upon which the Sheriff arrested Blakeney, but afterwards suffered him to escape, and he left the Province.

A verdict was found for the plaintiff for \$800, with leave reserved to move to enter a nonsuit.

February 1, 1890. *H. R. Emmerson* moved for a nonsuit, pursuant to leave reserved, or, failing that, for a new trial. The affidavit to hold to bail, upon which the *capias* was issued under which Blakeney was arrested, is insufficient for several reasons: 1. The cause of action set out in the affidavit was merged in the verdict, making the verdict the only cause of action. There was no cause of action for goods sold and delivered when the affidavit was made. 2. The affidavit should have stated that the arrest was not made or sought to be made for the purpose of vexing or harrassing the defendant in respect to the cause of action mentioned in the affidavit. It is not sufficient to allege generally that the arrest is not made for the purpose of vexing and harrassing the defendant. 3. There are no sufficient reasons given for the plaintiff's belief that Blakeney was about to leave the Province. Where an arrest is made after the commencement of the action, the reasons for the plaintiff's belief must be fully stated. 4. The affidavit is void, having been sworn before the attorney for the plaintiff. The rule that an affidavit to hold to bail may be sworn before the attorney of the party seeking the arrest does not apply to a case like the present. An affidavit to hold to bail after commencement of the action is an affidavit in the cause, and the rule of Court, that such an affidavit cannot be sworn before the attorney in the action, applies. *Reg. v. Marsh* (1); *Maritime Bank v. McKean* (2); *Davidson v. O'Connell* (3); *Goodtitle v. Badtitle* (4). A sufficient affidavit

(1) 25 N. B. Rep. 370.  
(2) 22 N. B. Rep. 526.

(3) 3 Fuga. 664.  
(4) 8 T. R. 688.

is a condition precedent to the right to issue a *capias*, and as the affidavit in this case is void, Blakeney was not legally held under arrest, and the defendant is not liable for his escape. The declaration alleges that all things necessary had been done to entitle the plaintiff to sue out a writ of *capias*, and as there was not a proper affidavit to hold to bail the defendant must succeed on his plea. The affidavit, therefore, was improperly admitted in evidence.

As to the damages: No actual damages were proved. There is a difference, as to the measure of damages, between permitting an escape where the arrest was on *mesne* process and one on final process. In the former case, actual damages must be proved; in the latter, there may be nominal damages, even though no real damages are shewn. See *Mayne on Damages*, 606-8; *Williams v. Mostyn* (1); *Clifton v. Hooper* (2). No precuniary damages were proved. The evidence shews that Blakeney was worthless.

*A. S. White*, contra. The reason for the rule allowing affidavits to hold to bail to be sworn before the plaintiff's attorney, was to secure secrecy, and for the convenience of the parties. The same reasons apply to the case of an arrest after the commencement of the action. 2 Chit. Arch. 1624. The statute, however, places the matter beyond doubt. Sec. 2 of the Act (Consol. Stat. cap. 38), requires the making and filing of an affidavit of debt conformably to sec. 1, and the practice of the Court in bailable actions. The practice in such actions is that the affidavit may be sworn before the plaintiff's attorney. As to vexing and harrassing the defendant, it is not necessary to negative that fact in respect to the cause of action. The requirement of the Act is that the affidavit state "that such arrest is not made for the purpose of vexing and harrassing the debtor"; and is different from the Attachment Act, which required that fact to be alleged in respect to the cause of action.

The cause of action is not the verdict; but, for goods sold and delivered. The nature of the claim is not changed until the judgment is signed. The affidavit, therefore, properly

1890.  
McMANUS  
v.  
WELLS.

(1) 4 M. & W. 145.

(2) 4 Q. B. 408.

1890.  
 McMANUS  
 v.  
 WELLS.

stated that the defendant was indebted to the plaintiff for goods sold and delivered. As to the objection that no reasons were given for the plaintiff's belief that the debtor was about to leave the Province, the Act requires none to be given. It only requires an allegation in the affidavit that the plaintiff "has good reason to believe and does believe that the defendant is immediately about to leave the Province." But admitting that the objections to the affidavit are tenable, they only render the affidavit irregular. Besides, the defendant has no plea under which the question can be raised. In superior courts, the *capias* itself being good on its face, is sufficient. The plea that the plaintiff "did not sue out a *capias* as alleged" will not allow the defendant to go behind the writ and attack the affidavit. To entitle the defendant to give evidence that the affidavit was not sufficient, or that there was no affidavit, it must be specially pleaded. Even if there is no affidavit, the Sheriff is bound to execute the process of the Court, it being a Superior Court, and if he fails to do so he is liable. *Impey on Sheriff*, 163. The defendant must shew that the *capias* was void, to entitle him to succeed.

As to the amount of damages: the case was properly left to the jury, the amount of the verdict was pointed out to them, also the various elements that went to shew damages, and their finding should not be disturbed. While it may be necessary to shew actual damages where the arrest is on *mesne* process, it is said in *Clifton v. Hooper* (1), that the amount is what the jury may think the plaintiff has sustained, for want of the body. Here, the plaintiff lost the benefit of an examination of the defendant, as to what property he had liable to be taken in execution or otherwise; if he had made fraudulent preferences, to have him imprisoned; also his evidence in any proceedings that might be taken to set aside fraudulent conveyances. See *Moore v. Moore* (2); *Vacher v. Cocks* (3); *Hanson v. Parker* (4); 2 Starkie on Evidence, 1014, 1016.

*Emmerson*, in reply.

*Cur. adv. vult.*

(1) 6 Q. B. 408.  
 (2) 25 Beav. 8.

(3) M. & M. 353.  
 (4) 1 Wils. 257.



The following judgments were now delivered :

1890.

McMANUS  
v.  
WELLS.

TUCK, J. This is an action against the Sheriff of the county of Albert for an escape. At the trial, there was a verdict for the plaintiff for eight hundred dollars, and this motion is to have a nonsuit entered, pursuant to leave reserved, or for a new trial.

The only point for nonsuit is, that the affidavit to hold to bail in the suit *McManus v. Joseph C. Blakeney* was improperly sworn. In that suit Blakeney was arrested upon an affidavit made and filed after the suit had been commenced, under the power given by cap. 38, sec. 2, Consol. Stat. This section enacts that "the plaintiff, after the commencement of an action by writ of summons, but before judgment in such action, upon making and filing an affidavit of debt conformably to the last preceding section, and the practice of the Court in bailable actions, with an allegation therein that he has good reason to believe, and does believe, that the defendant is immediately about to leave the Province; or on obtaining a judge's order for that purpose (in cases where, by the practice of the Court, a judge's order to hold to bail is necessary), may sue out a writ of *capias*, or one or more concurrent writs by *alias* or *pluries*, according to the practice of the Court." The affidavit to hold to bail was sworn before Joseph H. Yeomans, the attorney for the plaintiff in the cause then pending, in which the *capias* against Blakeney was issued. It is claimed that this affidavit is void, because it was sworn before the attorney in the cause. There is no doubt that the general principle is that an affidavit must not be sworn before the attorney or solicitor in the cause. But by rule of King's Bench, Trinity term, 15 Geo. 2, affidavits to hold to bail are an exception, and the same rule prevails under the new practice.

The argument, however, is, that this rule applies only where there is no cause in Court. I think that this is not a correct test. It does not anywhere appear that the rule, creating an exception in the case of affidavits to hold to bail, was made on the principle that there was no cause in Court. The better view, it appears to me, is, that the rule was made for convenience. Attorneys are oftentimes called upon to issue writs of

1890.  
McMANUS  
v.  
WELLS.  
Tuck, J.

capias because of emergencies which arise. A person in debt is about to leave the Province, and it is important that he should be at once arrested. It may happen that an attorney has to be consulted after usual business hours, when time would be lost if another attorney had to be found, before whom an affidavit must be sworn. Owing to the delay, the person whose arrest was sought might get away before a writ could be issued. A consideration like the one just named may have been one reason for the rule. And then another, likely, was the necessity for secrecy in such a case. When it is desirable to issue a writ to hold to bail, the mover in the proceeding wishes to confine the knowledge of his action to few persons, not to more, perhaps, than his own attorney and the officer who is to execute the writ. This may have been another reason for the rule. But whatever the reason, there is the rule, which is positive, that in case of an affidavit to hold to bail, it may be sworn before the officer who issues the process; and it matters not, in my opinion, whether it is issued before or after there is a cause in Court. Even if this reasoning is unsound, the language of the section seems to be conclusive on the subject, when it says that the plaintiff, after the commencement of an action, may sue out a writ of capias, upon making and filing an affidavit of debt, conformably to the practice of the Court in bailable actions. The practice of the Court is, that affidavits to hold to bail may be sworn before the attorney who issues the writ of capias.

Two grounds are urged on the motion for a new trial; one, the improper reception of evidence, and the other misdirection. All the points under the first head were practically disposed of at the argument, except the evidence of Joseph H. Yeomans, wherein he was allowed to state what was said to him by Charles L. Blakeney as to the mortgage on which he (Yeomans) paid six hundred dollars. At the trial, the plaintiff put in evidence a deed of land at Elgin corner, dated the 28th day of September, 1885, from Joseph C. Blakeney and wife to Lewis Carroll; also a mortgage, dated the 15th day of December, 1884, from Joseph C. Blakeney and wife to Charles L. Blakeney, of a piece of land containing nineteen acres, conditioned to pay three thousand dollars, with interest at seven per cent.,

on or before the first of January, 1888; and also a mortgage from Lewis Carroll and wife to Charles L. Blakeney, dated the 21st day of August, 1886, for the payment of six hundred dollars. It was the same land which was mortgaged by Joseph Blakeney to his brother Charles, afterwards conveyed by Joseph to Lewis Carroll, and in 1886 mortgaged by Carroll to Charles Blakeney. Objection was made by defendant's counsel to the admission of these documents. Plaintiff's counsel said that he wished to show that these transfers were fraudulent, and of a character that would have justified the Court or a Judge in committing Joseph C. Blakeney to prison. The deeds were then admitted. Yeomans, in his evidence, said that the defendant, after the escape, and before the writ in this cause had been issued, knew of these transfers, and told him that he had better take proceedings in Equity to show that these transfers were fraudulent and set them all aside. Witness, Yeomans, further stated that he paid Charles Blakeney for the last mortgage, six hundred dollars due on it, and when he paid him he asked him about the three thousand dollars mortgage. Objection was then taken to witness stating what Charles Blakeney said to him. It was pressed on the ground that the plaintiff had a right to show fraud in the conveyances, for the purpose of proving the actual damage he had sustained by the escape of Joseph Blakeney. The evidence was admitted, the learned Chief Justice saying he had a good deal of doubt about it. Yeomans then answered, that when he paid Charles the \$600, he said that Joseph owed him only \$600 at the time he made the mortgage for three thousand dollars. I think that his evidence was admissible in order to prove that the conveyances were fraudulent, and thereby show the actual damage which the plaintiff had sustained by the escape. If the proceedings were regular, there is no doubt that the sheriff was liable for an escape, either for nominal or substantial damages. To prove the actual damages, it became necessary to show the fraud between Joseph and Charles Blakeney, and what Charles said as to the nature of the transactions between them would be just as proper evidence as what Joseph said. In an action to set aside these conveyances, or on an application to the Court to commit Joseph Blakeney to prison because of a fraud-

1890.

McMANUS

v.  
WELLS.

Tuck, J.

1890.  
McMANUS  
v.  
WELLS.  
Tuck, J

ulent transfer, what some one stated that Charles told him about the mortgage would be receivable in evidence. The principle, which ordinarily applies to hearsay evidence, does not apply here. It is not secondary evidence; it is what Charles Blakeney, one of the parties to the fraud, says was the fact. The defendant, in answer to this action, avers that if there was an escape, there was no damage. The plaintiff replies there was substantial damage, because Charles Blakeney admits in effect that the mortgage to him was fraudulent. It seems to me that was the best evidence to prove the fraud, which the nature of the case admitted of, and that it was properly received. Joseph Blakeney, because of the sheriff's negligence, was not forthcoming, and therefore this evidence, which would have been good against Blakeney, was good in an action against the sheriff.

There remains then only the question of misdirection of the learned Chief Justice, in leaving to the jury to say what actual damage the plaintiff had sustained by the escape, and in not telling the jury that there was no evidence of special damage. Having read the charge carefully, I think the direction of the learned Chief Justice was entirely correct. He called the attention of the jury to the judgment which McManus had obtained against Blakeney, and what might have happened had he been arrested, and also to the alleged fraudulent conveyances. In conclusion, the Chief Justice said: "If you think McManus is entitled to the full amount of his judgment, that amount is \$1,407.80. If you think he is not entitled to the whole of it, but only to a part, then you will find for such amount as you think he has lost by the sheriff's neglect."

In my opinion, the evidence of the judgment recovered and of Joseph Yeomans was ample to justify the Judge's direction and the finding of the jury, and that the verdict should stand.

KING, J. This is an action against the Sheriff of Albert for escape.

McManus had sued one Blakeney and obtained a verdict for \$1,000. The postea was stayed. After verdict and before judgment, McManus caused a capias to be issued, upon which the sheriff arrested Blakeney, but suffered him to escape, and he left the country. A verdict for \$800 was found against

the sheriff in the present action; and Mr. *Emmerson* moves for a nonsuit, pursuant to leave, or for a new trial.

1890.

McMANUS

v.  
WELLS.

King, J.

The Act authorizing arrest on mesne process after action is brought, is Consol. Stat., cap. 38, sec. 2, and is as follows: "The plaintiff, after the commencement of an action by writ of summons, but before judgment in such action, upon making and filing an affidavit of debt conformably to the last preceding section and the practice of the Court in bailable actions, with an allegation therein that he has good reason to believe, and does believe, that the defendant is immediately about to leave the Province; or on obtaining a Judge's order for that purpose (in cases where, by the practice of the Court, a Judge's order to hold to bail is necessary), may sue out a writ of *capias*," etc.

Sec. 1 (so referred to in sec. 2), provides that a person may be arrested on mesne process, "if an affidavit be first made by the plaintiff, or his agent, of the plaintiff's cause of action, and that the amount thereof being not less than twenty dollars, is justly due to the plaintiff, and that such arrest is not made for the purpose of vexing or harrassing the debtor; provided always, that when the cause of action is other than a debt certain, a writ of *capias* may be issued to arrest the defendant, upon obtaining a Judge's order for that purpose, in such cases and in such manner as has heretofore been the practice. \* \* \* Such affidavit may be made before a Judge of the Court, or before any commissioner appointed to take affidavits to be read in the Supreme Court."

If the writ be absolutely void, the sheriff will not be liable for an escape; but it is otherwise if it is only irregular or erroneous. See *Weaver v. Clifford* (1); *Burton v. Eyre* (2); Buller's N. P. 60; 1 Saunders on Pleading, 1083.

It was contended for the defendant that the writ of *capias* was void on several grounds. Thus it is said that the cause of action sworn to, viz., for goods sold and delivered, was merged in the verdict. But the verdict has no such effect. Then it is said that the affidavit should state that the arrest was made or sought in respect of the cause of action mentioned in the affidavit. But the affidavit states what the Act requires, viz., "That the arrest of the said Blakeney, the above named

(1) Cro. Jac. 2.

Vol. XXIX., N. B. Reports.

29A

(2) Id. 288.

1890.  
McMANUS  
v.  
WELLS.  
King, J.

defendant in this action, is not made or sought to be made for the purpose of vexing or harrassing the said defendant." This is in the words of the Act. Next, it is said that there are no sufficient reasons given for plaintiff's belief that Blakeney was about to leave the Province. Under the proved circumstances of this case, I think that the reasons may be taken to have been very good ones. Besides, it would be merely an irregularity. The chief objection to the *capias* relied on by Mr. *Emmerson* was that there was (as contended by him) no affidavit of debt at all. The affidavit was sworn before Mr. Yeomans, who was attorney on the record for McManus in the suit then pending, in which the *capias* was sued out. Mr. *Emmerson* contends that the rule allowing an attorney to take an affidavit to hold to bail applies only to the case where the affidavit is made before action brought, and not to an arrest after action brought. The reason often given for the exception which allows an attorney for the party to take the affidavit to hold to bail is, that at that stage there is no action brought and no attorney on the record. And it is contended that, the reason of the rule failing where arrest is made under sec. 2 of cap. 38 after action brought, the rule is not applicable.

But there are two answers to this contention. The Act says that the arrest may be made upon making and filing an affidavit of debt conformably to the last preceding section and the practice of the Court in bailable actions. The first answer is that, by the last preceding section thus referred to, it is enacted that such affidavit may be made before a Judge of the Court, or before any commissioner appointed to take affidavits to be read in the Supreme Court: and, therefore, any such commissioner may take the affidavit under sec. 2. \* Certainly, the words "any such commissioner" have as wide a meaning when applied to sec. 2 by words of reference as they have in their direct application to the provisions of sec. 1.

It would not seem that anything more need be said; but if further answer is required, it may be found in the words referred to by Mr. *White*, viz., "that the affidavit is to be conformable to the practice of the Court in bailable actions." Mr. *Emmerson* says that this refers to the contents of the affidavit alone. But it is not so limited, and the *jurat* is an essential

part of an affidavit. In Tidd's Practice, 492, it is said "affidavits may be considered with reference to their title, contents, *jurat*, stamp and filing." All these things are matters relating to the practice. The question respecting the person before whom an affidavit is to be sworn is a matter or question of practice; and therefore the practice as to the persons who are entitled to take affidavits to hold to bail is part of the practice of the Court in respect of bailable actions, to which the affidavits made and filed under sec. 2 of cap. 38 are to be conformable. It does not matter what was the reason for the rule allowing the attorney of the party to take an affidavit to hold to bail. It is the practice, and the statute makes the practice applicable to arrests under sec. 2.

It is further contended that proof of actual damage is essential to the maintenance of an action for escape, and that there is no such proof here.

In *Williams v. Mostyn* (1), it was held that in an action for escape on *mesne* process (which this is), proof of actual damage is necessary. It was otherwise in case of escape upon final process, when arrest on execution was permitted: *Clifton v. Hooper* (2). See *Hobson v. Thelluson* (3), per Blackburn J. In *Stimson v. Farnham* (4), which was an action against a sheriff for not levying under a writ of *fi. fa.*, and for a false return, it was held that actual damage was necessary to support the action; and that, as the goods which the sheriff was charged with not having taken and sold in satisfaction of the execution, were not the property of the execution debtor, the plaintiff had sustained no damage from the conduct of the sheriff, and could not maintain the action.

But to return to the case of an action for escape on *mesne* process. It is said in Saunders on Pleading and Evidence, 1073, "The plaintiff is entitled only to such damages as he can show he has sustained. Any special damage sustained by the escape should be proved. If he has lost the whole debt, the jury must give him damages to that extent. If he can still recover his debt, the damage may be diminished accordingly — *Scott v. Henley* (5), *Morris v. Robinson* (6) — and no action

1890.

McMANUS

v.

WELLS.

King, J.

(1) 4 M. & W. 145.  
(2) 6 Q. B. 468.

(3) L. R. 2 Q. B. 642.  
(4) L. R. 7 Q. B. 175.

(5) 1 M. & R. 227.  
(6) 3 B. & C. 196.

1890.  
 McMANUS  
 v.  
 WELLS.  
 King, J.

lies unless there be proof of actual damage: *Williams v. Mostyn*" (1). Then was there here proof of actual damage? I think there was. The plaintiff recovered judgment in the action, and so was entitled to the debt sued for. Then it was shown that at the time of the arrest Blakeney had at least \$100 in cash. This would be sufficient to prevent a nonsuit on such ground.

As to the amount of the verdict, it may perhaps be too large. The verdict having been for \$1,000 on the original action, I take it that the affidavit to hold to bail was for that amount. In this action, the plaintiff recovered \$800. It was shown that Blakeney had acted very fraudulently in respect of his affairs, and with the avowed object of defeating the plaintiff. The evidence of Leman, his clerk, leaves little room to doubt that if he had been held in custody by the sheriff, the plaintiff might have obtained an order for his further imprisonment, under sec. 32. Such imprisonment is in the nature of punishment for not obeying the order of the Court; but still it is also a means of enforcing payment of the money, and so may, I think, fairly be taken into account as a means through which the arrest and consequent detention of Blakeney might reasonably be advantageous to the plaintiff towards securing payment of his claim. Not only the debtor's own resources are to be considered, but all reasonable probabilities founded on his position in life, that the debt would have been discharged. *Macrae v. Clarke* (2).

In *Moore v. Moore*; *Re Mozley* (3), it was held by the Master of the Rolls, that *prima facie* the amount of the judgment would be the amount of damages in an action for escape; but that this might be reduced by defendant showing facts to show differently. In *Mayne on Damages*, p. 411, it is said that since the passage of the Act authorizing a judgment debtor to be detained in prison only seven days after judgment, it is difficult to say how the damages are to be assessed. See also *Arden v. Goodacre* (4) and *Hemming v. Hale* (5).

Upon the whole I should prefer if the verdict were reduced. The remaining questions relate to the admission of evidence.

(1) 4 M. & W. 145.  
 (2) L. R. 1 C. P. 403.

(3) 25 Beav. 3.  
 (4) 11 C. B. 371.

(5) 7 C. B. N. S. 487.



Several of the objections relate to statements and acts of Blakeney. These are clearly admissible. Admissions and acts of Blakeney before the escape are admissible in this action against the sheriff, who has, by his wrongful act, prevented plaintiff from prosecuting his claim against Blakeney.

One of the objections was to admissions by Charles Blakeney, a brother of the debtor, to the effect that a less amount was due him than the amount for which a mortgage had been given to him by the debtor. It was sought by plaintiff to show that this mortgage was fraudulently given. But Charles Blakeney is not a party to the record, nor has the sheriff in any way done anything which makes Charles Blakeney's statements evidence against him. It is mere hearsay, and I think was improperly admitted. The learned Chief Justice expressed doubts as to it, but it was pressed. There is, however, a piece of evidence which would seem to render it immaterial. For immediately after the objectionable question and answer, Mr. *Yeomans* is asked this question: "Do you know whether the \$3,000 (*i. e.*, the amount of the mortgage to Charles Blakeney) is discharged on the record?" and Mr. *Yeomans* answered, "Yes—the 23rd day of August, 1886." This was before judgment was signed in the suit by the plaintiff against Blakeney, and before the arrest and escape. The objectionable evidence becomes, therefore, immaterial.

I therefore think that the nonsuit and new trial should be refused.

SIR JOHN C. ALLEN, C. J. I agree that the application for a nonsuit or new trial should be refused. I only wish to add that I am not satisfied that the plaintiff's attorney can properly take an affidavit of the plaintiff after the commencement of an action. But, at most, it is only an irregularity, and cannot, therefore, avail the defendant in this action. Besides, he has no plea under which the matter could be raised.

WETMORE, PALMER and FRASER, JJ., took no part.

*New trial refused,*

1890.

McMANUS

*v.*  
WELLS.

King, J.

1890.

## HALIFAX BANKING COMPANY v. SMITH ET AL.

May 3.

*Bond given on settlement of suit against indorsers of note — Defence that indorsement was forged to plaintiff's knowledge — Evidence of statement by maker of note — Belief of Plaintiff's counsel as to forgery when bond given — Cross-examination — Question arising out of examination in chief — Proof of handwriting — Opinion of witness.*

The defence to an action on a bond was that defendants were induced to give the bond in order to stifle a prosecution against S. the maker of a note, for forging the defendants' names as indorsers thereon; which note was discounted by the Plaintiff Bank for S., and on which an action was pending against the defendants when the bond was given. The jury found that the defendants had indorsed, or authorized the indorsement of the note; and that they signed the bond voluntarily and without undue pressure by the plaintiff. Verdict for Plaintiff.

*Held*, on motion for a new trial :

Per WETMORE, KING and TUCK, JJ. (ALLEN, C. J., and PALMER, J., dissenting on the latter ground), 1. That evidence of a statement by S. to the plaintiff's agent, that the indorsements on the notes were not forged, was not admissible, either as part of a conversation between the plaintiff's agent and S. given on cross-examination, or as evidence of the agent's belief that the indorsements were genuine, and that the taking of the bond was a *bona fide* transaction.

2. That evidence that the plaintiff had not given any instructions to prosecute S. for forgery was inadmissible. (ALLEN, C. J., and PALMER, J., dissenting.)

3. That evidence of the belief of the plaintiff's counsel, who took part in the settlement when the bond was given, as to the genuineness of the plaintiff's claim in the action on the note, was improperly received. (ALLEN, C. J., and PALMER, J., dissenting.)

4. Evidence of a witness that a signature purporting to be that of one of the indorsers on the notes was written by the same person who had signed a paper admitted to be genuine, but which paper was not then shewn to the witness, is admissible. (Per ALLEN, C. J., WETMORE, PALMER and TUCK, JJ.)

This was an action upon a bond given in settlement of certain suits which had been brought by the plaintiffs against the present defendants on a number of promissory notes. At the trial, which took place before His Honor Mr. Justice Tuck, at the Saint John circuit, in January, 1889, a verdict was found for the plaintiffs.

June 15, 17, 1889. *Blair, A. G.*, moved for a new trial on the grounds of improper admission and rejection of evidence.

*D. I. Hanington, Q. C., E. McLeod, Q. C., and C. A. Palmer*, contra.

The following authorities were cited: *Doak v. Johnson* (1); *Prince v. Samo* (2); *Stobart v. Dryden* (3); *Palmer v. Wilbur* (4); *Lister v. Perryman* (5); *Ravenga v. Mackintosh* (6); *Bank of British North America v. Strong* (7); *Panton v. Williams* (8); *Williams v. Bayley* (9).

1890.

HALIFAX  
BANKING CO.  
v.  
SMITH.

*Cur. adv. vult.*

The following judgments were now delivered :

TUCK, J. A motion is made for a new trial in this cause, on the ground of the improper rejection of evidence and the improper admission of evidence.

The action is on a bond in the penalty of nineteen thousand dollars, executed by the defendants to the plaintiffs; and the defence is, that the defendants were induced by the plaintiffs to execute the bond, in order to stifle a prosecution for a criminal offence.

Before the bond was signed, in October, 1886, the plaintiffs had commenced suits against the defendants, as indorsers of promissory notes, who alleged that their names indorsed on the notes were forged. Finally, and when the suits were about to be tried in the County of Albert, a compromise was effected, which resulted in this bond being given.

At the trial, in Saint John, in January, 1889, two questions were left to the jury, namely: First, Did the defendants indorse the promissory notes in question, or authorize their names to be indorsed? Second, When the defendants signed the agreement, were they free and voluntary agents, or did they execute it under undue pressure exerted by the plaintiffs or their duly authorized agents?

To the first question five of the jurors answered "Yes," and to the second, five said that they were free and voluntary agents, and that they did not execute under undue pressure exerted by the plaintiffs or their duly authorized agents. Upon this finding, a verdict was entered for the plaintiffs.

At the argument, objection was taken to the disallowance of only one question. On the re-examination of Albert J.

(1) 2 Kerr 319.  
(2) 7 A. & E. 627.  
(3) 1 M. & W. 615.

(4) 3 All. 443.  
(5) L. R. 4 H. L. 521.  
(6) 2 B. & C. 693.

(7) 1 App. Cas. 307.  
(8) 2 Q. B. 169.  
(9) L. R. 1 H. L. 200.

1890.  
HALIFAX  
BANKING Co.  
v.  
SMITH.  
Tuck, J.

Smith, one of the defendants, this question was put to him: "I ask you if you had not taken steps to institute proceedings against him (Alonzo) for wages previous to that?" This was objected to and rejected, and I think properly so; for if legal proceedings were meant, there was another way to prove the fact. But even if admissible, it is immaterial, as answers afterwards obtained from the same witness furnish the evidence required.

Objection is also made to certain evidence pressed in by the plaintiffs' counsel, and admitted by the Judge with reluctance and after much hesitation. The principal part of this class of evidence was offered for the purpose of showing that when the bond was executed, the plaintiffs were acting *bona fide*, fully believing that the indorsements on the promissory notes were not forged. Counsel for the plaintiffs argued that, as the plea alleges that they knew the notes were forged, they had a right to disprove that allegation by evidence, which went to shew they did not know, and did not believe, the notes were forged.

Before considering this class of testimony, it is claimed that the answer given to a question put to W. Alder Trueman on cross-examination was improperly admitted. On his direct examination, Mr. Trueman had been asked by defendants' counsel the following questions: "I want to know if before this bond and mortgage were made, did not Alonzo Smith come back, that is, between July and October, 1886, and was he not hidden in the County of Albert? And when this bond was made, was he not hidden in the County of Albert?" Answer—"I only knew that from hearsay." "Did you know it from Mr. Wallace?" "I did not." "Did you know it from Mr. Middleton?" "I cannot say that I did." "Did either of them tell you they went to New Horton in 1886, and saw him secretly?" "One of them, I can't say which, told me that he saw Alonzo Smith some time, but whether between those dates I cannot say." "Can you remember where you were told they saw him—did they tell you?" "No." "Did you not understand it was at Charles Turner's, in New Horton?" "Well, now, I think it was, when you mention it."

On cross-examination, the plaintiffs' counsel interrogated the

witness as follows: "I think you said that Middleton said to you he had seen Alonzo Smith somewhere in Albert County, or at New Horton?" "Yes, I think he did, at some time or other." "Did, or did not, Mr. Middleton at that time tell you that Alonzo Smith said the notes were not forgeries?" This was objected to, and after the questions and answers as to this matter, the Judge said that he would allow the remainder of the conversation to be given subject to objection. Counsel not waiting for an answer to the questions which had just been allowed, put this one: "I want you to give all the conversation, confining yourself first to the conversation with Mr. Middleton, or Mr. Wallace, whichever it was, when he said he went and saw Alonzo Smith. Then at that very time, and as part of that conversation, did he not further say to you, whichever one it was, that Alonzo Smith said that these notes were not forgeries?" Objection to the question was renewed and it was allowed. Witness answered, "Yes, he did; he used words to that effect."

1890.  
 HALIFAX  
 BANKING Co.  
 v.  
 SMITH.  
 Tuck, J.

It was claimed at the trial, and at the argument, that the question was a proper one, because counsel had a right to lay before the Court the whole of the conversation which the witness had at that time with Wallace or Middleton, or at least so much of it as might explain or qualify the matter already deposed to on direct examination. I think the question was clearly inadmissible. The rule is not that the whole matter that passed in the same conversation is made admissible by the adversary's introduction of any part; but only so much of it as can be in some way connected with the statement proved, and which may explain or qualify it. In *Prince v. Samo* (1) it is held that a witness who has been cross-examined as to what plaintiff said in a particular conversation, cannot, on that ground, be re-examined as to other assertions made by the plaintiff in the same conversation, but not connected with the assertions to which the cross-examination related; although the assertions as to which it is proposed to re-examine be connected with the subject-matter of the present suit. Here, all the witness was asked on his direct examination was, if Middleton or Wallace did not tell him that they went to New

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(1) 7 A. & E. 627.

1890.  
HALIFAX  
BANKING Co.  
v.  
SMITH.  
Duck, J.

Horton between July and October, 1886, and saw Alonzo Smith there secretly. The witness answered that one of them did tell him that he saw Alonzo Smith. The object of the counsel in asking the question was to show that at this time Alonzo Smith was hiding in the county, and that Wallace and Middleton knew it. And because of this question and answer, the opposing counsel, on cross-examination, gets from the witness what Middleton or Wallace at the same time told him as to a conversation he had with Alonzo Smith when he did see him. What possible connection has the one thing with the other?

It is true, that by this method of cross-examination the plaintiffs succeeded in securing evidence most material to enable them to obtain a verdict; but in my opinion the evidence was not within the rule. It related to the subject matter of the suit; but Alonzo Smith saying that the notes were not forgeries, did not in any way explain or qualify that Wallace or Middleton had told witness, that he had seen Alonzo Smith secretly. See 1 Taylor on Evidence, sec. 733. But it is said, that even supposing the right to put the question cannot be sustained for the purpose of getting out the remainder of a conversation, it is good, as an original one, in order to to prove that the plaintiffs acted *bona fide*, when the bond was executed. I think this proposition cannot be maintained. If what Alonzo Smith said to Wallace or Middleton, as to the notes not being forged, is good evidence, then let Wallace or Middleton be called to prove what was said to him. Surely it is not competent to prove by a third person, what Wallace or Middleton told him had been said by Alonzo Smith. Mr. Trueman, the witness, had no personal knowledge of the matter, but was asked to repeat only what he had been told by another, what Alonzo Smith had said to him. How possibly can the fact that this information, that the notes were not forged, received from Alonzo Smith by Middleton, and communicated by him to Trueman, be evidence that the plaintiffs acted *bona fide* in prosecuting their action against the defendants, and did not stifle a criminal prosecution? The objection just now is not to the agents of the bank stating, on oath, what Alonzo Smith said to them as an evidence of honest belief of the genuineness of the notes; but because Mr. Trueman was

allowed to state what he heard from them, in order to show their honest belief. The difficulty about this evidence is, that it does not, in any way, tend to prove that the plaintiffs acted upon what had been said by Alonzo Smith. It was hearsay information, of the most objectionable character, offered for the purpose of influencing the minds of the jury.

1890.

HALIFAX  
BANKING Co.  
v.  
SMITH.  
Tuck, J

The next evidence, to which objection is made, is that given by Henry Middleton as to a conversation he had with Alonzo Smith in March, 1886. The witness was asked to detail the conversation which took place between himself and Alonzo Smith at that time, and to confine it to the subject matter between the bank and the defendants. In answer, the witness said: "I told him that it was generally reported around that his brothers intended to swear that they were forgeries; and says he, 'I was within fifteen minutes of Hampton at that time, and if they did so, I would have been in Court so quick as would make their heads swim.'" Then follows this question by counsel: "After you said what his brothers intended to do at Hampton, he said if they had done that," when witness answered: "'They know they daren't do it.' He used the words, 'daren't do it.'" I think this evidence was properly admitted. It was offered to shew that the plaintiffs acted upon a *bona fide* belief, upon an assurance from Alonzo, that the indorsements were not forgeries. Here the plaintiffs contend that the facts brought to their knowledge furnished reasonable and probable cause for them to believe that the defendants had indorsed the several promissory notes, and that they were not forged; and they had a right to give these facts in evidence. This evidence was material for the purpose of shewing that the agreement of July, 1886, was not entered into in order to stifle a criminal prosecution. It was properly argued that, if at the time the agreement was made the plaintiffs had reasonable cause for believing the defendants had really indorsed the notes, then Alonzo was not liable to be prosecuted criminally, and there was no criminal prosecution to stifle. What Alonzo Smith, the alleged forger, said as to the notes, furnished poor reason for forming a belief, but this goes rather to the weight of the evidence than its admissibility. I have not been able to find a case where the question arose

1890. in an action similar to this one. All cases where this principle as to the admissibility of evidence is discussed, are those  
 HALIFAX BANKING Co. for malicious prosecution, where the jury is required to find  
 v. SMITH. facts to enable the Judge to determine whether or not there  
 Tuck, J. was reasonable and probable cause for the prosecution. Such cases are *Ravenga v. Mackintosh* (1), and *Lister v. Perryman* (2).

Objection is made to this question to Henry Middleton, viz., "I ask whether at any time you had any authority to prosecute or take proceedings against Alonzo Smith — I mean any criminal proceedings?" His answer is: "I had no authority whatever." On cross-examination the following questions were put and answers given: "If I understand you, your contention about those notes was, that they were genuine, and that was always your contention?" Answer: "Yes." "But if the Smiths proved they were forgeries, what then was to be the consequences?" "I told them the bank would go for their brother." "What do you mean by going for their brother?" Answer. "Take proceedings." "What kind of proceedings?" Answer. "To try and bring the brother back." Further on he says, "that we should fetch Alonzo back, if possible, to refute what they swore in Court. If it were then proved that they were forgeries, we would take proceedings against him for forgery." And yet he says, that he never, at anytime had authority to take proceedings against Alonzo Smith; which is wholly inconsistent with other evidence that he gave. I think this evidence should not have been allowed. The witness should have stated the facts as to what instructions he received in respect of criminal proceedings, from which the jury might infer whether or not he had authority to prosecute Alonzo Smith.

I had for a time some doubt as to the right of the witness, Horatio A. Wallace, to state his conclusion that the signature, "Albert J. Smith," on the notes, was written by the same person who signed a paper not produced; and the same with regard to the signature of Simon Smith. The witness had been speaking of having compared the signatures indorsed on the notes, with signatures of Albert J. and Simon Smith,

(1) 2 B. &amp; C. 893.

(2) L. R. 4 H. L. 521.



admitted to be genuine by Mr. Dickson and Mr. Trueman, attorneys present, acting respectively for the bank and the Smiths. He was then asked the conclusion at which he, at that time, arrived. I think it was competent for him to do so although the paper containing the genuine signature was not in Court. It is quite within the principle of the decision of this Court in *Vye v. Alexander* (1).

I think the evidence given by Mr. D. L. Hanington, counsel for the plaintiffs, as to his belief in the genuineness of the indorsements on the notes, was improperly received. At the time he formed the opinion he was not the agent, nor the solicitor of the bank. He was simply counsel retained to try their cases against the Smiths. The belief of counsel is apt to be in favor of the side on which they are retained; and evidence of that belief in Court, to influence the result of the trial of a cause, ought not to be encouraged. Perhaps no evidence bearing on the question of the forgery, had so much weight with the jury, as that of Mr. Hanington,—weight from the fact that he is a leader in his profession, and from the manner in which his testimony was given. It is not objectionable on this account, but because, in my opinion, evidence of counsel in a cause, as to his belief whether indorsements on certain promissory notes are forgeries or not, is not good evidence. The belief of counsel is entirely different, as regards the right to give it in evidence, from that of a party to the action. The latter may be given in order to assist in determining the question of “reasonable and probable cause,” in an action for malicious prosecution. No one ever heard of evidence of a counsel’s belief being given in a like case. I think that Mr. Hanington’s evidence stands in an entirely different position from that of Wallace and Middleton. They were duly accredited agents of the bank. Mr. Hanington was only counsel.

The question objected to is: “At the time you met these defendants and their solicitors, please tell me as to your belief as to whether these indorsements on the notes were genuine or not?” The answer is: “I certainly believed they were, and thought we could prove it. I thought from my instructions,

1890.  
HALIFAX  
BANKING Co.  
v.  
SMITH.  
Tuck, J.

1890.  
HALIFAX  
BANKING Co.  
v.  
SMITH.  
Tuck, J.  
—

and from the evidence to be given, that we could prove the liability of these three defendants to the bank, and I went up to the Court to try the cases, when I happened in at the hotel." There is other evidence of a like character, and I think it all objectionable.

All of this evidence which, I think, was improperly admitted, must have been considered by the jury to enable them to answer the second question. It bore directly upon the question of undue pressure, and the free and voluntary act of the defendants.

It is contended that, under the evidence, the defendants cannot set up this defence of undue pressure at law. It is argued that they gave confessions, acted on the agreement, received all the notes and the McDonald draft, and therefore cannot in this action set up threats and undue pressure, without being prepared to put the plaintiffs in the same position in which they were before the bond was made. I think the answer to this contention is, that if the pleas had been found in the defendants' favor they would be entitled to recover, for there is evidence which shows that the agreement and bond are not voidable only, but absolutely void.

Something was said at the argument about the verdict being against the weight of evidence, but this was not much pressed. Had the decision been left to me, I would have said "no" to the questions where the jury have said "yes," and would have found a verdict for the defendants; but I am not prepared to say that there is not sufficient evidence to warrant the finding of the jury.

I am of opinion, however, for the reasons given that there must be a new trial.

KING, J. This is an action upon a bond given in settlement of certain suits which had been brought by plaintiffs against defendants, on certain promissory notes purporting to be indorsed by defendants, but as to which the defendants had (in the former action) pleaded that the notes were forged by one Alonzo Smith. In this action upon the bond the defendants plead duress, etc.

(His Honor here stated the effect of the pleas.)

The plaintiffs obtained a verdict, the jury finding that when the defendants executed the bond they were free and voluntary agents, and did not act under pressure exerted by the plaintiffs or their authorized agents.

The grounds of the motion for new trial (as argued) relate solely to points of the admission and rejection of evidence. First, as to alleged improper rejection of evidence. The defendants complain of the disallowance of the following question to Albert J. Smith, one of the defendants, on re-examination, viz: "I ask you if you had not taken steps to institute proceedings against him (Alonzo) for wages previous to that?" The plaintiffs were seeking to show that Alonzo Smith was in fact a partner with defendants, and the defendants contend that the question so objected to was intended to show that their relations were not that of partners. The plaintiffs' counsel urges that the question so disallowed was substantially answered afterwards. This seems to be the case; and besides defendants' counsel does not appear to have pressed his question, which, it may be further remarked, was very objectionable from the point of view of being leading.

Then as to the reception of evidence objected to.

(1.) W. A. Trueman was attorney for plaintiffs in the actions on the notes, and in connection with the obtaining of the bond in question. He was called by the defendants as a witness, and on his direct examination was questioned as to having been told by Middleton, the agent of the bank, that he, Middleton, had seen Alonzo Smith at New Horton. The defendants had shown that Alonzo Smith had gone off, and had then come back and secreted himself at New Horton, and the object of the defendants in asking Trueman as to what Middleton had told him regarding his seeing Alonzo Smith, was to show that the bank people knew of the fact of Alonzo Smith keeping concealed. Upon the cross-examination, the plaintiffs' counsel asked Mr. Trueman the following question: "Did or did not Mr. Middleton at that time tell you that Alonzo Smith said that the notes were forgeries?" This was objected to and is now complained of. The answer was that Middleton said that Smith told him that the notes were genuine. It is contended by the *Attorney General* for defendants, that the evidence of

1890.

HALIFAX  
BANKING Co.v.  
SMITH.

King, J.

1890.  
HALIFAX  
BANKING Co.  
v.  
SMITH.  
King, J.

Trueman's conversation with Middleton, given on the direct examination, would not let in that which the plaintiffs subsequently got in evidence.

The question as to Alonzo being seen, was an entirely different subject from that as to what was said by Alonzo. Alonzo Smith's being secreted was a fact relevant to the issue, and the bank's knowledge of this was a relevant fact, and these facts were sought to be proved by the admission of Middleton, the agent of the bank, who had seen him.

Only so much of the further conversation as tends to explain or qualify the part of it already in evidence is admissible. 1 Taylor, p. 631, sec. 662. *Prince v. Samo* (1); *Stobart v. Dryden* (2).

It might be that upon a question whether Alonzo Smith was hiding on account of forgery, what he himself said at the time might show whether he was so hiding or not.

Strictly it would not seem that evidence could be given of what Middleton said that Smith told him, merely because evidence had been given of that Middleton said that he had seen Smith. But it really does not look as if the jury could reasonably be influenced by Alonzo Smith's unsworn statement that the notes were not forgeries. He had said as much impliedly when he gave the notes to the bank.

Further, the jury having negatived the use of undue threats by the bank, the evidence in question would not seem to be material, as it would not bear on the question of fact so found by the jury.

(2.) The next question objected to, was a similar question to Middleton himself on direct examination, as to the conversation he had with Alonzo Smith.

This was not as part of a conversation got out by defendants, but was wholly brought out by plaintiffs' counsel on direct examination. It is attempted to be sustained on the ground that it is evidence of the grounds of Middleton's belief that the notes were not forgeries, on which the bank acted; in other words, that it goes to show that the plaintiffs had reasonable grounds of belief that the notes were genuine.

But is the question of reasonable grounds for their belief at

all in issue, or relevant? One question would be whether the notes were genuine or not. Another would be whether plaintiffs believed them to be genuine or forgeries — not whether they had reasonable grounds for belief, but belief or non-belief as a fact. Yes or no.

Here again, however, it may be said that the finding of the jury that there were no threats used, renders this branch of the evidence immaterial. Unless indeed, it might be argued, that if there were no forgery, a jury might conclude there were no threats.

(3.) Question to Middleton as to whether he at any time had any authority to prosecute or take proceedings against Alonzo Smith. The *Attorney General* contends that whether he had authority or not is immaterial — the real question is whether he made threats of prosecution. The counsel for plaintiffs says in answer, that it was evidence as showing that the bank did not have knowledge or belief of the forgery. I do not think this a good answer. It seems to me that it is calculated to lead the jury to think that it would not be likely that Middleton made threats, because he had no authority to carry them out.

(4.) The next objection is to the evidence of Wallace in giving his belief that the name of Albert J. Smith, written on the notes, was written by the same person who signed a paper not produced, but which was examined by Wallace before the trial. The paper with which the notes were compared by Wallace had been admitted by Dickson (Smith's attorney) to be in Smith's writing. The question was: "And you believe that the name written on the note was the same as that in the documents." The defendants' counsel objected to this evidence unless the document referred to was produced; and as Wallace, who made the comparison, does not seem to have ever seen Albert J. Smith write, or to have had any correspondence with him, and as the document with which the note was compared was not produced, it seems clear that this evidence was objectionable.

Here, however, again the question arises whether this evidence is made immaterial by the finding of the jury negating the use of threats.

(5.) Question to W. A. Trueman: "Had you any instruc-

1890.  
HALIFAX  
BANKING Co.  
v.  
SMITH.  
—  
King, J.  
—

1890.  
HALIFAX  
BANKING Co.  
v.  
SMITH.  
King, J.

tions, or did you ever hear of anything such as prosecuting Alonzo?" This is like the question to Middleton already considered.

(6.) Question to D. L. Hanington: "At the time you met these defendants and their solicitors, what was your belief as to whether these endorsements on the notes were genuine or not." I think it was competent to the plaintiffs to show that they, and those concerned for them in taking the bond in question, did not know or believe that the notes were forgeries.

WETMORE, J. The motion for a new trial in this case was made on the ground of improper rejection and improper admission of evidence.

As to the objection, disallowing an answer to the question put to Albert J. Smith: "I ask you if you had not taken steps to institute proceedings against him, Alonzo, for wages previous to that?" I do not see what any proceedings he had taken, or was about taking against Alonzo, had to do with the present case, or how, or why, it would be thereby affected.

As to the admission on cross-examination of Mr. Trueman, of the following question: "I want you to give all the conversation, confining yourself just to the conversation with Mr. Middleton and Mr. Wallace, whichever it was, when he said he went and saw Alonzo Smith; then at that very time, and as part of that conversation, did he not further say to you, whichever it was, that Alonzo Smith said these notes were not forgeries?" Had this evidence stood alone, its admissibility may be questionable as being a statement by Middleton to Trueman of what Alonzo told him; but in view of Middleton subsequently giving the actual conversation he had with Alonzo, I do not think what Middleton told Trueman, that Alonzo said to him should, even if improperly admitted, which I think it was, not being explanatory of the question and answer of defendants' counsel, be allowed to disturb the verdict. This matter should rather resolve itself into the point as to whether or no what Alonzo Smith said to Middleton as to the genuineness of the notes, was admissible in evidence against these defendants. In Mr. Middleton's evidence, he speaks of a conversation with Alonzo Smith, about March 1886, when Alonzo

was brought into the room with him, and is allowed, subject to objection, to detail the conversation had, and in which Middleton said: "This is a very bad business Alonzo, whatever did you do as you have done?" and Alonzo said, "I have been misled by that rascal Vernon," and witness said, "Have I not been a better friend to you than Vernon was?" Middleton then told Alonzo: "It was generally reported around that his brothers intended to swear at Hampton that the notes were forgeries," and Alonzo said, "I was within fifteen minutes of Hampton at the time, and if they did so, I would have been in Court so quick as would make their heads swim." Question: "After you had said what his brothers intended to do at Hampton, he said he knew they daren't do it." "He used the words 'daren't do it,'" and then he followed up with the expression witness had given."

1890.

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 HALIFAX  
BANKING Co.
v.  
SMITH.Westmore, J.  

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Witness was also asked whether he had any authority at any time to take criminal proceedings against Alonzo, and, subject to objection, he said he never had. I cannot see that this is of any consequence.

As to the evidence of H. A. Wallace, on his direct examination, in giving the conclusion at which he arrived that the signature "Albert J. Smith" on the notes was written by the same person who signed a paper not produced. I think the case of *Vye v. Alexander* (1), lately decided in our Court, sanctions evidence of this kind, however frail its character may appear. It was stated on the argument that this question was not objected to, and I do not see any objection on the stenographer's notes.

As to the objected statement of what Mr. Middleton told Trueman, Alonzo Smith had said in respect to the genuineness of the notes, which seems to me was absorbed in the evidence given by Mr. Middleton in detailing the conversation had between him and Alonzo Smith: The question then comes broadly up as to whether what Alonzo told Mr. Middleton of the notes being genuine is admissible. Such statements would, I think, not be evidence to establish the signatures of the contending parties, and should not have been presented for the consideration of the jury. It is important on this point, to

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 (1) 23 N. B. Rep. 89.

1890.  
HALIFAX  
BANKING Co.  
v.  
SMITH.  
Wetmore, J.

consider the questions that were submitted to the jury. The first question was: Did the defendants indorse the promissory notes in question, or authorize their names to be indorsed? The jury answer, 5 to 2, yes. I cannot say, considering all the evidence, that the jurors who arrived at this conclusion, were not most materially influenced by what Alonzo is stated by Mr. Middleton, to have said. This evidence, it seems to me was wrongly received. In the argument, Mr. *Hanington* contended that the plaintiffs were entitled to hold the verdict, no matter whether plaintiffs believed the notes were forgeries or not, and in this view it was immaterial whether the signatures were forgeries or not. To this I cannot accede. The mere fact of the notes being forgeries, might not have made any difference, but if the plaintiffs believed them to be forgeries, it would make a most important difference as to the materiality of the evidence. And on this point, the evidence of Mr. *Hanington*, which is objected to, is very important. While Mr. *Hanington* could prove the genuineness of the notes as well as any other witness, he should have such knowledge as would be required to enable him to prove it. His mere belief, without sufficient facts upon which to found such belief,—as having seen the party write or the like—is not sufficient. His evidence was as follows:—

Q. "At the time you met these defendants and their solicitors, please tell me as to your belief as to whether these indorsements on the notes were genuine or not?" (Objected to). A. "I certainly believed they were, and thought we could prove it. I thought from my instructions, and from the evidence to be given, that we could prove the liability of these three defendants to the bank, and I went up to the Court to try the cases, when I happened in at the hotel."

Q. "And from all the evidence before you, to what amount did you think you could recover?" (Objected to.) A. "All the notes."

Q. "And in all the suits then pending?" A. "Yes, I thought so, and I told them what I thought."

By the Court:—"Did you know at the time, the defence they were setting up was that the notes were forged?" A. "I heard so at the time."



Q. "Did you prepare yourself to meet the defence of forgery?" A. "Yes, that is exactly what I did. We went to meet the other defences; the real defence was that the defendants had not signed the notes or authorized their signatures, and I thought we could do it, and was just as strong in my opinion as I am today."

By Mr. Palmer.—"I ask you your opinion now?" (Objected to.)

Q. "I ask you your opinion then?" (Objected to.) A. "Yes, it was so then: otherwise I should have advised the bank to withdraw."

This evidence I think was quite inadmissible to prove the genuineness of the signatures.

It may be, that the only defence to the suit was, that the agreement was completed in order to prevent Alonzo being prosecuted for forgery, or by reason of threats to prosecute him if the genuineness of the notes was disputed. The genuineness of the notes was thoroughly gone into on both sides as being material to sustain one side or the other. Both parties so treated the matter; and I am impressed that the jury must, in the conclusion they arrived at on the second question, have been influenced by the conclusion they arrived at on the first: I certainly cannot say they were not. Therefore, if evidence was wrongly received to prove the genuineness of the notes, it seems to me the verdict should not be allowed to stand.

PALMER, J. This was an action on a bond made by the defendants in settlement of a former action against them and their brother, Alonzo, which was defended on the ground that their names were forged by Alonzo to the notes on which they were then sued; and they now allege that they were induced to settle and give the bond in question to stifle the prosecution for forgery against their brother. It was tried before Mr. Justice Tuck at the Saint John Circuit, and resulted in a verdict for the plaintiffs. This is a motion for a new trial on the ground of the improper rejection and admission of evidence, and the verdict against the weight of evidence.

The settlement complained of was made at the Circuit where the action on the notes was to be tried, and was alleged

1890.  
HALIFAX  
BANKING Co.  
v.  
SMITH.  
Wetmore, J.

1890.  
HALIFAX  
BANKING Co.  
v.  
SMITH.  
Palmer, J.

to have been effected by the plaintiffs' agents, Middleton and Wallace, their attorney and counsel and agent Trueman and Hanington, and the defendants and their counsel, Mr. Emmerson.

The only rejection of evidence was the ruling out by the learned Judge of the following question, which was put to one of the defendants, Albert J. Smith, on re-examination: "I ask if you had not taken steps to institute proceedings against Alonzo for wages previous to that?" It appears to me there are three conclusive grounds why this was properly rejected. First—It was wholly irrelevant. Second—It did not arise out of the cross-examination; and third, if material, it would have been proving not only legal proceedings without the production of them, but their contents and the construction thereof. The improper admission of evidence complained of, was the question put to the defendants' witness, William A. Trueman, on cross-examination: "I want you to give all the conversation, confining yourself to the conversation with Middleton or Wallace, whichever it was, when he said he went and saw Alonzo Smith. At that very time, and as part of that conversation, did he not say to you (whichever one it was) that Alonzo Smith said that those notes were not forgeries?" And to the evidence of Henry Middleton, on direct examination, giving the conversation with Alonzo Smith as to the notes being forgeries. These two objections may be taken together. In order to understand the ground on which they were admitted, it is important to state that both witnesses—Trueman was the plaintiffs' attorney in the first suits, and Mr. Middleton was the plaintiffs' manager, and directed the proceedings; and it is only through the actions of these two persons, as their agents with others, the plaintiffs were charged with having made the agreement to stifle the prosecution.

The first question appears to be proper, because the defendants themselves had put in a part of the conversation which the witness had with Alonzo Smith, and therefore the plaintiffs were entitled to put in the rest. But, independent of that, the pleas, in effect, alleged that the plaintiffs, through their agents, believing that Alonzo was guilty of forgery, had induced the defendants to give the bond to stifle such prosecution. The plaintiffs' contention was, that they believed that

the notes were genuine notes of the defendants, and that Alonzo Smith had not forged them, and they settled by taking a portion of their claim rather than further prosecute the suit, and not to stifle any prosecution for forgery; so it became important to show what was both these persons' belief upon that subject, and Middleton was allowed to give, in his direct examination, his belief that the notes were genuine, and not forgeries; and although it was objected to at the trial, such objection was abandoned on the argument as being wholly untenable, as it clearly was; for the whole question involved was whether these plaintiffs did right or wrong in making the settlement, and hinged upon their belief as to whether Alonzo had committed forgery or not. For surely the agents of this bank not only ought not to have proceeded against Alonzo for forgery, if they believed the notes were not forgeries, but it would be a gross wrong to do so. Then if such is the matter to be proved, and if this question is the one to be passed upon by the jury, all information that these gentlemen had bearing upon it ought to be submitted to the jury, to see what was the ground of their belief. If, on the one hand, Alonzo Smith had told them they were forgeries, the jury might think they thought they were forgeries. If, on the other hand, Alonzo had told them they were not forgeries, and that the defendants would not dare, when the trial came on, to assert they were, the jury might, if they chose, believe them. That this can be done, appears to be laid down by Lord Bramwell, in *Lyell v. Kennedy* (1). In addressing the House of Lords, he says: "A man surely would be at liberty, if he was bound to state his belief, to state his reasons for it, and to say 'That is my belief founded upon those reasons, and upon that information which has been given to me.'"

Another question put to Middleton, which was objected to, was: "I ask you whether you had at any time any authority to take any proceedings against Alonzo Smith?" It appears to me that it was entirely relevant to the matter to ask this question. If the plaintiffs had given any authority to their agent to prosecute Alonzo Smith, it would be strongly confirmatory of the defendants' case. If no such authority was

1890.

HALIFAX  
BANKING Co.

v.

SMITH.

Palmer, J.

1890.  
HALIFAX  
BANKING Co.  
v.  
SMITH.  
Palmer, J.

given, it would tend to the contrary. It is a matter which plaintiffs, under such a heavy charge, ought to clear up.

The only other questions insisted on was the question put to Mr. Trueman: "Did you believe that you were then prepared to prove these indorsements?" that as to the proving of the genuineness of the indorsements, and "Whether you had any instructions, or heard anything with reference to prosecuting Alonzo?" and "From all the evidence before you, for what amount did you think you could recover?" and the answer, "All the notes."

Mr. Hanington was one of the plaintiffs' agents, and was their counsel who assisted in effecting the settlement; and it was of importance to prove not only that these indorsements were genuine, but that he thought the plaintiffs could recover on them, as it would negative any idea of his compromising a forgery.

As to the verdict being against the weight of evidence: when you look at the extraordinary character of this whole proceeding; the fact that these defendants have got an assignment, by virtue of the settlement of their claim against Alonzo Smith, got delivered up to them their own notes joined with Alonzo, which was the consideration for the settlement; that they have not returned or offered to return any of these, but that some of them have been made away with and were not produced at the trial; and the strong evidence of the genuineness of these notes, and there being nothing opposed to it but the interested evidence of these defendants; I think so far from the verdict being against the weight of evidence, if the verdict had been the other way I should have felt myself constrained to set it aside as being against the weight of evidence.

I therefore think there is no ground whatever for a new trial in this case.

I omitted to notice the objection to the admission of the evidence of H. A. Wallace (the inspector of the bank who was active in making the settlement and procuring the bond in dispute) by giving the conclusion at which he arrived that the signature, "Albert J. Smith," on the notes, was written by the same person who signed the writing that he, together with the attorneys on both sides (Dickson and Trueman) examined, and

which was admitted was signed by Albert J. Smith, but was not produced ; also the same in reference to Simon Smith.

The circumstances that led to the admission of this evidence and the objections made to it, is detailed in the stenographer's notes of the trial ; and it shows that this witness stated without objection, that he was acquainted with Albert J. Smith's handwriting, by seeing his signature on notes in the bank in the course of its business with him ; that the notes in dispute were given up to him at the time of the settlement, and he did not produce them at the trial, stating that he could not find them. This witness was also allowed to say without objection, that he had examined, in the presence of counsel for both parties, a writing (the assignment to the defendants in trust from Alonzo Smith), and that the signatures to the notes given up, which the defendants now claim to be forgeries, was the same as on his genuine notes that he had from time to time seen in the bank. And he was allowed to prove that he, together with the attorneys on both sides (Dickson and Trueman), examined a writing (the assignment from Alonzo to the defendants in trust), upon which it was objected that as such writing was not in Court, he could not give such an opinion. But it was apparent, if I am right in what I have said before, that the belief of all persons who effected this settlement, and procured the bond upon which this action was brought, that the notes which were settled by the bond were not forgeries, was proper evidence to be given, this was competent evidence. Even if he knew nothing of Smith's writing, these are his reasons for forming such a belief ; but independently of that, he says he believed it to be the handwriting of Albert J. Smith, which he knew by a perfectly legitimate way, under the rule laid down in *Doe dem. Mudd v. Suckermore* (1), by Patteson, J., who says: "A writing may be proved by the belief which a witness entertains upon comparing the writings in question with the exemplar in his mind derived from some previous knowledge, which knowledge may be acquired by the witness having seen letters or other documents professing to be the handwriting of the party, etc., or by any other mode of com-

1890.  
— HALIFAX  
BANKING Co.  
v.  
SMITH.  
—  
Palmer, J.  
—

(1) 5 A. & E. 703.

1890.  
HALIFAX  
BANKING Co.  
v.  
SMITH.  
Palmer, J.

munication between the party and the witness, which, in the ordinary course of the transactions of life, induces a reasonable presumption that the letters or documents were the handwriting of the party."

As this witness had acquired such knowledge by A. J. Smith giving his notes in his dealings with the Bank, and which he had seen, he would know whether or not the writing that was examined was the same; and this would be the more valuable after having his attention fully called to other writings which he would recognize as those of the parties. Therefore I think there is nothing in this ground.

SIR JOHN C. ALLEN, C. J. A new trial was moved for in this case principally on the following grounds :

1. Rejecting the question put to Albert J. Smith, one of the defendants, on re-examination, whether he had not taken steps to institute proceedings against Alonzo Smith for wages, previous to his making an assignment to Peyton Vernon.

2. Allowing W. A. Trueman, the plaintiffs' attorney, a witness for the plaintiffs, to be asked on cross-examination, whether, in a conversation between him and either Mr. Middleton or Mr. Wallace, one of them had not said to him that Alonzo Smith stated that the notes were not forgeries.

3. Allowing Mr. Middleton to state in his direct examination in the rebutting case, the conversation he had with Alonzo Smith as to the notes not being forgeries.

4. Allowing Mr. Middleton to be asked in his examination-in-chief, whether he had any authority at any time to take criminal proceedings against Alonzo Smith.

5. Allowing Mr. Wallace to state on his direct examination, his belief that the name "Albert J. Smith" written on a note then shown to him, was written by the same person who signed the name "Albert J. Smith" on a paper which was not then produced to the witness.

6. Allowing the plaintiffs' attorney to state that he never had any instructions to prosecute Alonzo Smith criminally for the alleged forgery.

7. Allowing Mr. Hanington, the plaintiffs' counsel, to state that at the time he met the defendants at Hopewell, in July,

1886, he thought the indorsements on the notes were genuine ; and that from the evidence then before him, he thought the plaintiffs could recover the whole amount of the notes in all the suits then pending.

A number of other objections were stated in the notice of motion, but they were abandoned at the argument.

As to the first objection : I am unable to see how the question, whether Albert J. Smith had taken steps to institute proceedings against Alonzo Smith for wages, before a certain assignment was made, was relevant to the issue to be tried in this case ; but if it was a proper question, I do not think the rejection of it would necessarily be a ground for a new trial, as I cannot see how the answer to it could have affected the verdict. If the object of the question was to show that the witness had brought a suit against his brother—which seems to be the way in which it was understood—it could not have been proved in the manner proposed, and therefore was properly rejected.

The contention of the plaintiffs' counsel in answer to the second objection, was that it properly arose out of Trueman's evidence given on his direct examination.

I do not find that any evidence was given by Trueman on his direct examination, of any conversation between Middleton and Alonzo Smith, to warrant the admission of such evidence. The only question asked Trueman on this point by the defendants' counsel was, whether either Middleton or Wallace had told him that he had gone to New Horton between the months of July and October, 1886, and had seen Alonzo Smith secretly : not a word about any conversation with him. I do not, therefore, see that the defendants' counsel had opened the door for the admission of the question objected to. The declaration of Alonzo Smith could not, as a general rule, be evidence, unless the defendant made it so by inquiring into the conversation between Alonzo Smith and Middleton.

But the question arises, whether the circumstances of the case, and the purpose for which Alonzo Smith's declaration was offered, do not make it an exception to the general rule.

The issue to be tried, was whether the bond on which this action is brought, was given by the defendants in consequence

1890.

HALIFAX  
BANKING Co.

v.

SMITH.

Allen, C. J.

1890.  
HALIFAX  
BANKING Co.  
v.  
SMITH.  
Allen, C. J.

of a threat by the plaintiffs that they would prosecute Alonzo Smith for forging the defendants' names as indorsers on certain promissory notes made by Alonzo, and discounted by the plaintiffs, unless the amount of their claim on those notes was settled.

Trueman was the attorney for the plaintiffs in an action brought against the defendants as indorsers of those notes, and Middleton was the plaintiffs' managing agent at Hillsborough, where the notes were discounted for Alonzo. The defence to this action was, that the bond was given in order to prevent a threatened prosecution against Alonzo for forging the defendants' names as indorsers upon the notes. It became therefore, material for the plaintiffs to shew that their agent, Middleton, and Trueman their attorney, believed the defendants' indorsements on the notes to be genuine, at the time they settled the suit on the notes by taking the bond. If they believed the indorsements were genuine, and that the plaintiffs could have recovered on them, they could have no motive for threatening to prosecute Alonzo for forgery unless the defendants settled the matter.

I think the principle which governs in actions for malicious prosecution, as to what is evidence of reasonable and probable cause for making a charge, will apply to this case.

The leading case on that subject is *Lister v. Perryman* (1), where it was held that hearsay evidence was sufficient to establish a defence of reasonable and probable cause in an action for false imprisonment on a charge of felony, the defendant believing the statements made to him, and on which he acted, to be true.

I think that, on the same principle, the statements made to Trueman as to what Alonzo Smith had said about the genuineness of the notes, was admissible for the purpose for which it was offered, viz.: his reason, or one of his reasons, for believing that the indorsements were not forged.

The next objection was the admission of Middleton's statement of a conversation with Alonzo Smith in 1886, in which Smith stated that the indorsements on the notes were not forged.

The admission of this evidence depends upon the same

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(1) L. R. 4 H. L. 521.



principle as Middleton's statement to Trueman; though the grounds for belief were weaker in Trueman's case.

Middleton's statement was, that he told Alonzo Smith that it was generally reported that the defendants had intended to swear at the trial in the action on the notes, that the indorsements were forgeries; to which Alonzo answered that they dared not do so—stating what he would have done if they had so sworn.

Middleton's belief in the genuineness of the indorsements was a material circumstance for the consideration of the jury on the question of duress.

The fourth and sixth objections are alike, and may be considered together. They do not seem to me to be sustainable. If either Middleton or Trueman induced the defendants to settle the action on the notes then standing for trial, by threatening to prosecute Alonzo for forging the indorsements, it would be immaterial whether they had any instructions from the plaintiffs to take such proceedings or not; but still, I think it would be important for the plaintiffs to show that they had not given any such instructions.

I do not think the fifth objection is sustainable. In addition to what has been said by Mr. Justice Palmer on this ground, the case of *Alexander v. Vye* (1) may be referred to as bearing on the question of proof of handwriting.

The remaining objection is to the admission of Mr. Hanington's belief in the genuineness of the indorsements, he being the counsel for the plaintiffs in the action on the notes.

The same question arises as in the objection to the evidence of Trueman and Middleton. But some doubt has been expressed whether the belief of the counsel in the cause would be evidence, even if the belief of the agent or attorney of the plaintiff would be so.

Mr. Hanington went to Albert county as counsel for the plaintiffs, for the purpose of trying the action on the notes; but when a settlement was proposed, and the terms of it were being discussed, he took a very active part in the discussion; advising Messrs. Middleton and Wallace in reference to the defendants' ability to pay, and the time to be given them; and

1890.

HALIFAX  
BANKING Co.

v.

SMITH.

Allen, C. J.

(1) 16 Can. S. C. R. 501.

1890.  
HALIFAX  
BANKING Co.  
v.  
SMITH.  
Allen, C. J.

generally as to the terms of the proposed settlement, having, apparently, much more to say in the matter than Mr. Trueman, the attorney on the record: in fact, throughout those negotiations Mr. Hanington acted as the agent for the plaintiffs; so that his belief of the genuineness of the indorsements was equally material with the belief of either Mr. Trueman, Mr. Middleton, or Mr. Wallace.

The latter part of the question to Mr. Hanington as to his belief whether the plaintiffs could have recovered the amount of the notes in the suit then pending, seemed at first to be objectionable; but on further consideration, I think it meant nothing more than his belief that the indorsements were genuine, and that the defendants could not sustain their plea that they had not indorsed the notes. It is difficult to suppose that the question could have intended to have any other meaning.

I think none of the objections to the rejection or admission of evidence are sustainable.

As to the verdict being against evidence. There certainly was evidence that the defendants were told that if they swore in the action on the notes, that their names as indorsers, were forged by their brother, the plaintiffs would prosecute Alonzo for the forgery. But Messrs. Middleton, Wallace and Trueman also swore that they never had any doubt as to the genuineness of the notes, and that they treated the defendants' denials of having indorsed them, as mere evasions to escape the payment of them.

The threats to prosecute Alonzo might, therefore, have been found by the jury to have been contingent on the defendants' denying on oath in Court the genuineness of the indorsements, which was the state of circumstances sworn to by the plaintiffs' witnesses, and not as a threat to the defendants that the plaintiffs would prosecute Alonzo for forgery, unless the defendants paid the amount due on the notes; the plaintiffs or their agents believing that the indorsements were forged, and that they could not recover in the action on them, and therefore, using the threat to prosecute Alonzo, as an inducement to force the defendants to give the bond and mortgage, and thereby prevent the exposure of their brother to a criminal prosecution.

There was evidence on which the jury might have found in favor of either party on this question; and I am not prepared to say that there was such a preponderance in favor of the defendants on this point, as to require the granting of a new trial.

1890.  
HALIFAX  
BANKING Co.  
v.  
SMITH.  
Allen, C. J.

FRASER, J., took no part.

*New trial granted.\**

BURPEE ET AL., APPELLANTS, AND WETMORE, RESPONDENT.

1890.

*Equity Practice—Demurrer—Time for filing—Consol. Stat., cap. 49, secs. 2 and 28—Act 45 Vic. cap. 8, sec. 4.*

March 20.

Where a demurrer had been ordered to be taken off file because it was not filed within a month after service of a copy of the Bill and interrogatories on the defendant, according to the Consol. Stat., cap. 49, sec. 28:

*Held*—Per King, Fraser and Tuck, JJ. (Allen, C. J., dissenting), that the practice was altered by the Act 45 Vic., cap. 8, sec. 4, and that a demurrer could be filed without a Judge's order, after the expiration of a month from the service of the Bill, etc., and within ten days after demand of a plea, answer, etc., served on the defendant.

This was an appeal from the decision of the Judge in Equity, setting aside demurrers filed by the appellants (the defendants below) in this case, on the ground that they had been filed more than thirty days after service of a copy of the plaintiffs' bill and interrogatories, without leave of the Court.

The judgment appealed from was as follows:

The bill and interrogatories in this case were served on the Attorney-General, as solicitor for Sterling, and the executor of the deceased Sterling, on the 27th December last, and on Barry, the solicitor of Thompson, and of the executor of Pickard, on the same day; on McAlpine, the solicitor of Ferris, on the 16th of December; on Weldon, McLean & Devlin, as solicitors of Charles Burpee and George G. King, on the 16th December, and as solicitors for E. R. Burpee on the 4th May.

The demurrers were served on the 10th May for the Central Railway Company, for Sterling, and for the executor of Sterling; Thompson, and the executor of Pickard, on the 27th May, and for Ferris;

\* Reversed on appeal by the Supreme Court of Canada (18 Can. S. C. R. 710).

1890.  
BURPEE  
v.  
WETMORE.

and] on the 9th July by Charles Burpee, George G. King and E. R. Burpee; and on the 21st July I granted an order *nisi* to set them aside, and have them taken off file, on the ground that it was irregular to file them after the thirty days after service of bill and interrogatories, without having a Judge's order to do so.

The motion was heard on the 21st August, when the Attorney-General shewed cause for the Central Railway Company, Charles Burpee, Sterling, Thompson, and for Sterling and Thompson as executors; McAlpine for Ferris; and McLean for George G. King and E. R. Burpee; who contended that the demurrers were regularly on file, and if there was any irregularity it was waived by their being set down for argument. No affidavits were produced, but it was contended that as the demurrers stood for hearing at this Court, they must have been ordered to be set down; at all events, it was waived by the delay.

These facts raise questions of practice of importance to the profession. Therefore, I will endeavour to state what I conceive to be the practice in this Court in respect to the points involved. I think this is regulated by the 49th cap. of the Consol. Stat., sec. 2, which, together with 17 Vic., cap. 18, sec. 2, makes the practice of the High Court of Chancery in England, as it existed in the month of March, 1839, except so far as it was altered by the Act, or some orders or settled practice of the Court, the practice.

Then, what was the practice of the High Court of Chancery in England at that time in respect to the putting in of a general demurrer to the whole bill? On this subject, Hinde's Practice, published in 1785, at page 110, lays it down as follows:

"A demurrer, as it asserts no facts, but relies upon matter apparent on the face of the bill, is put in without oath, and without being signed by the party. It is therefore considered that a defendant may, by advice of counsel, upon sight of the bill only, be enabled to demur. For this reason a demurrer must be filed within eight days, exclusive of the day of appearance, or before an order for time is obtained, the Court never indulging a defendant with time to demur alone; nor can a demurrer under an order for time be regularly filed, it being a special condition of every order for time that the defendant shall not demur alone."

This eight days was, I think, extended to twelve by some order made before 1839; but that is of no consequence in this case. This being the practice in England, let us see how it is altered by the Act referred to, or the practice of this Court. The first Act upon the

subject was 17 Vic., cap. 18, sec. 7, which enacted as follows: "If the defendant in any suit appear, a copy of the bill, with a copy of the interrogatories (which shall then be filed as part of the plaintiff's bill), shall be served on the defendant's solicitor; the interrogatories to be founded on the allegations in the said bill contained, and numbered in the same manner as such allegations. If no demurrer, plea or answer be filed, and a copy thereof served on the plaintiff's solicitor within one month from such service, any Judge at any monthly sitting may on affidavit of the facts, and on production of the clerk's certificate of the filing of the bill and interrogatories, and that no plea, answer or demurrer has been filed by such defendant, be moved that the said bill be taken *pro confesso* against such defendant, and the same shall be so ordered without further order or proof; provided always, that it shall be made to appear by affidavit to the satisfaction of the Judge hearing such motion, before any such order shall be made, that at least fourteen days previous notice of the said motion shall have been given to the solicitor of such defendant; and provided also, that the Judge may, on cause shown by affidavit, and on such terms as he may impose, grant further time to such defendant to put in a plea, answer or demurrer." And this section was continued by the 28th sec. of cap. 49, Consol. Stat. After the passing of this section, it is obvious that the time for filing a demurrer was extended to thirty days, but it does not authorize it being put in after that, unless the time is extended by the order of the Court or a Judge; and accordingly the present learned Chief Justice, in the case of *McCourt v. McCarthy*, as reported in *Stevens' Digest*, 1079, decided that the defendant cannot file a demurrer as a matter of right, after the expiration of a month after the service of a copy of the bill and interrogatories, as required by 17 Vic., cap. 18, sec. 7; and if so filed without leave, it will be ordered to be taken off the file. This, I think, I must take as the settled practice of this Court when the Consolidated Statutes passed, and as such by that statute made the continued practice thereof. It follows that all the demurrers were improperly filed, and I think it is the right of the plaintiff to have them ordered off the file, as was done in the case referred to, if he has not waived such right. I am not satisfied that I can refer to the order to set the demurrers down for argument, nor do I think that the fact of the plaintiff setting them down would necessarily show that he had waived the right to set them aside, as the practice of the Court obliged him to set them down or have them allowed. See Earle's Rules, p. 213 — Orders of 2nd August, 1842 —

1890.

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BURPEE  
v.  
WETMORE.

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1890.  

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BURPÉE  
v.  
WETMORE.

No. 13. But I think this irregularity, like all others, should be taken advantage of within a reasonable time, or it will be waived; and I think whenever there is a reasonable time to do so before the next step is to be taken, then, in the absence of any excuse, he should apply before that time expires, which in this case would be before the expiry of the thirty days allowed for setting down the demurrer to be argued. This time the plaintiff allowed to elapse as to all the demurrers, except Charles Burpee's, King's, and E. R. Burpee's, and therefore I think he thereby waived the right to have them set aside, and, therefore, all except those referred to must be allowed to stand; but as to these three, the application was made in time, and they must be ordered off the file, and I think the plaintiff must pay the costs of these defendants against whom he has not succeeded, and he will be allowed his costs as to those in which he has succeeded.

I say nothing as to whether I should take judicial notice of the orders setting down the case for hearing, as if I did so, I know myself — as regards the order for setting down the demurrers I have ordered off the file — I made it for my own convenience, so that all the demurrers should come on together, and that order was made after this summons was taken out, and was distinctly made without prejudice to this application as to the setting aside of the demurrers of these three defendants.

I have not referred to the statute, cap. 8, sec. 4, of the Acts of 1882, which provides that no motion shall be made to take a bill *pro confesso*, without a ten days demand, as it is apparent that this is no motion to take the bill *pro confesso*, and there is nothing in that Act which professes to make a different practice with reference to the right to file demurrers. The whole effect of that Act, in my judgment, is to make a demand of a plea or answer necessary before the bill can be taken *pro confesso*, but it does not profess to authorize a defendant to put in any pleading in any different manner than the practice before authorized.

The order will be made accordingly.

October 9, 1889. *Weldon, Q. C.*, in support of the appeal. If the practice as provided for by Consol. Stat., cap. 49, sec. 28, had not been altered, the learned Judge could have properly ordered the demurrers off the file, for if no demurrer, plea or answer was filed within one month from the service of the bill and interrogatories, the plaintiff was entitled to have his bill taken *pro confesso* unless further time was granted by the

Judge on good cause shown. But under the provisions of 45 Vic., cap. 8, sec. 4, a demand of "plea, answer, replication or other pleading" must be served before a motion to take a bill *pro confesso* or to dismiss the same can be made. This Act introduces a new practice, and gives ten days after demand within which to plead, answer or demur. It is true that a demurrer is not mentioned as one of the pleadings to be demanded, but the words of the Act are broad enough to include a demurrer. The words are, "plea, answer, replication or other pleading." In the present case, there was a demand of a "plea or answer;" and within the ten days after the demand, the demurrer was filed. This was a compliance with the demand, and entitles the defendants to have their demurrers on file. But if the plaintiff was entitled to have the demurrer struck off the files, he waived his right, by having them set down for hearing.

1890.

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 BURKE  
 v.  
 WETMORE.

*Wallace, contra.* The case of *McCourt v. McCarthy* (1), decides that under Consol. Stat. cap. 49, sec. 28, a demurrer cannot be filed after the expiration of one month from the service of the bill, without a Judge's order. This practice has not been altered by 45 Vic. cap. 8, sec. 4, which merely requires that the plaintiff make a demand of plea, answer, replication or other pleading, ten days before moving to take the bill *pro confesso*. The motion in this case was not to take the bill *pro confesso*, and the time for filing a demurrer has not been extended. The amending Act does not use the word "demurrer," and to read it into the section, would seem to give it an unreasonable construction, by requiring that the plaintiff should demand an objection to his own pleading. A demurrer is not such a pleading that "for want of," to use the words of sec. 4, a motion to take a bill *pro confesso* or to dismiss the same, would be made. The section clearly refers only to what might be called the regular steps or proceedings in a suit. If the defendant fails to take the ordinary steps after having appeared, the demand is to be made. This clearly is not intended to call upon him to take exception by way of demurrer to the plaintiff's pleading. After thirty days from the ser-

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 (1) Stev. Dig. 1079.

1890.  

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BURPEE  
v.  
WETMORE.

vice of the bill, the defendant, if he seeks to demur must still first obtain leave of the Court. The demand is only to apprise the defendant of the plaintiff's intention to move. As to the English practice, see *Bruce v. Allen* (1), and *Taylor v. Milner* (2).

*Weldon, Q. C.*, in reply.

*Cur. adv. vult.*

The following judgments were now delivered :

KING, J. The question in this case is whether a demurrer to a bill may be filed after the lapse of one month from the service of the bill, without the leave of the Judge first had and obtained. The question depends upon the construction of the Act of Assembly, 45 Vic. cap. 8, sec. 4. Prior to such Act the practice was regulated by the 28th section of cap. 49. of the Consol. Stat. By that section, after providing for the service of the bill and interrogatories it was declared that :

"If no demurrer, plea or answer be filed and a copy thereof served on the plaintiff's solicitor within one month from such service, any Judge, at any monthly sitting, may, on affidavit of the facts and on production of the clerk's certificate of the filing of the bill and interrogatories, and that no plea, answer or demurrer has been filed by such defendant, be moved that the said bill be taken *pro confesso* against such defendant, and the same shall be so ordered without further order or proof; provided always that it shall be made to appear by affidavit to the satisfaction of the Judge hearing such motion, before any such order shall be made, that at least fourteen days previous notice of the said motion shall have been given to the solicitor of such defendant; and provided also, that the Judge may, on cause shewn by affidavit, and on such terms as he may impose, grant further time to such defendant to put in a plea, answer or demurrer."

It was held in *McCourt v. McCarthy* (1), under like provision in the 17 Vic. cap. 18, sec. 7., that the defendant cannot file a demurrer as a matter of right, after the expiration of a month after the service of a copy of the bill and interrogatories; and if so filed without leave, it will be ordered to be taken off the

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(1) 1 Madd. 558.

(2) 10 Ves. 444.

(3) Stev. Dig. 1079.



file. Would not the same rule apply in the case of a plea or answer filed without leave after the expiration of the month?

1890.

BURPÉE

v.

WETMORE.King, J.

Then in 1882 the Act 45 Vic. cap. 8, sec. 4 was passed, which declares "that no notice for a motion to take a bill *pro confesso*, or to dismiss the same, be given or made for want of plea, answer, replication or other pleading, in any case, unless after the time specified for delivery thereof, a demand thereof respectively be previously made in writing at least ten days, on the solicitor of the party from whom such answer, replication or other pleading (as the case may be) is required."

In the present case no plea, answer, or demurrer was filed during the month after service of the bill and interrogatories. The plaintiff then made a demand that a plea, answer, or other pleading be filed within ten days. The defendants filed a demurrer as of right, without obtaining the order of a Judge, and the plaintiff applied to the Judge in Equity to have the demurrer taken off file, and the learned Judge granted the application. The defendants now appeal. In his judgment the learned Judge says: "I have not referred to the statute cap. 8, sec. 4, of the Acts of 1882, which provides that no motion shall be made to take a bill *pro confesso* without a ten days demand, as it is apparent that this is no motion to take the bill *pro confesso*, and there is nothing in that Act which professes to make a different practice with reference to the right to file demurrers. The whole effect of that Act, in my judgment, is to make a demand of a plea or answer necessary before the bill can be taken *pro confesso*, but it does not profess to authorize a defendant to put in any pleading in any different manner than the practice before authorized."

Upon the argument of the appeal Mr. *Weldon* for the appellants contended that the effect of the Act of 1882 was to assimilate the practice in equity to that at common law, except as to the time allowed by the demand. Mr. *Wallace* for the respondent, contended that the plaintiff could not do what the demand called upon him to do, without first obtaining leave or order of the Judge. And he further contended that the Act of 1882 did not extend to the case of a demurrer, and that the demand which the statute provides for, is a demand for a plea

1890.  
BURPKE  
v.  
WETMORE.  
King, J.

answer or other pleading, which (as contended) does not cover a demurrer.

First, as to whether the Act authorizes a defendant to put in any pleading in any different manner than the practice before authorized—a point which the learned Judge has decided in the negative.

The Act does not in terms say that the period named in the demand (10 days at least) is to elapse before the 14 day notice of motion may be given, but I think that this is fairly to be implied. Can it be that while time limited in a demand for doing a thing is running, the party on whom the demand is made can be treated as if in default? If this were so, the demand for plea, etc., might name 20 days, and on the day after the service of it the plaintiff might serve a 14 days' notice of motion and move before the time mentioned in the demand.

It is true, also, that the Act in question says nothing about the defendant (or plaintiff) being at liberty to file and serve the plea, answer, replication, &c., (as case may be). Neither does the 28th sec. of cap. 49 say in terms that the defendant may file plea, answer or demurrer within one month; but this is implied in the provision that if no plea, answer or demurrer is so filed and received, the plaintiff may move that the bill be taken *pro confesso*. Where the Act provides that one party, before moving against the other for want of a plea, answer, replication or other pleading (as the case may be), shall make at least a ten days' demand for the same, it seems to me to imply that the party on whom the demand is made shall have that period in which to do the act, and that he shall have power within that period to comply with the demand.

And as the giving of the demand, including non-compliance with it, is a condition of the right of a plaintiff to move to take a bill *pro confesso* for want of a plea, answer or other pleading, or to give notice of such motion, I am of opinion that, in reading the two Acts together (the 28th sec. of cap. 49, Consol. Stat., and the 4th sec. of the Act of 1882), the time allowed by the terms of the demand is to be regarded as added to the one month given by the 28th sec. of cap. 49, Consol. Stat., as an extended period within which the defendant may act in pursuance of the demand, and that the "further time"

which the Judge may grant to the defendant means further time after the defendant has, by his default, placed the plaintiff in a position to move against him. In short, I think that in reading the two enactments together the plaintiff cannot treat the defendant as in default, and move for judgment *pro confesso*, until the two periods elapse (viz., the one month and the time limited by the demand), and that in the interpretation of the proviso as to the Judge giving further time, it is as though the Act of 1882 had extended the period of one month named in the 28th sec. of cap. 49, Consol. Stat., to six weeks or two months; in which case, I think there could be no doubt of defendant's right to file and serve plea, etc., as of right.

It appears to me that the contention of respondent on this point deprives the demand of all useful purpose as a demand. If the defendant still has to get a Judge's order before he can file his plea, etc., he is not placed differently from his position before the Act, except as to the time being extended. For after receiving notice of motion, the defendant was before the Act in a position to apply to the Judge for leave to plead, etc., and according to respondent's view he has no more right under the demand. In respondent's view, the demand operates simply as a lengthening of the fourteen days' notice to twenty-four days or more. If this had been the intention, I think it would have been accomplished by extending the required time of notice of motion.

For these, amongst other reasons, I think that, as regards anything within the requirements of the 4th sec. of the Act of 1882, the party on whom the demand is made need not get a Judge's order in order to qualify or empower him to comply with its terms.

Then it is said that the Act makes demand a condition for moving for judgment *pro confesso*, and that this is not an application for judgment *pro confesso*; but in the same way the Consol. Stat., cap. 49, sec. 28, merely imposed conditions upon moving for judgment *pro confesso*. And yet it was held that upon such default as would entitle plaintiff to move for judgment *pro confesso* he might move to take plea, etc., off file if one were improperly filed. In short, the plaintiff is not

1890. •  
BURPÉE  
v.  
WETMORE.  
King, J.  
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1890.  
 BURPEE  
 v.  
 WETMORE.  
 King, J.

entitled to have the plea, etc, taken off unless it is filed under circumstances which enable plaintiff (notwithstanding the plea) to move for judgment *pro confesso*.

The next question is whether the Act of 1882 extends to the case of a demurrer. The words are: That no notice of motion to take bill *pro confesso*, or to dismiss the same, shall be given for want of plea, answer, replication, or other pleading without \* \* a demand \* \* of at least 10 days on the solicitor of the party, from whom such answer, replication or other pleading (as the case may be) is required. The question is whether a demurrer is included in the general term "or other pleading." It is to be noted that a plaintiff who seeks to take a bill *pro confesso* under sec. 28, cap. 49, Consol. Stat., can only do so if the defendant has failed to plead, answer or demur. And his notice of motion is to take such bill *pro confesso* for want of plea, answer or demurrer. There can be no notice or motion to take a bill *pro confesso* for want of a plea, answer, or replication alone. If there is a demurrer it prevents such notice or motion. Therefore it might seem that when it is said "no notice of motion to take a bill *pro confesso*, or to dismiss the same, shall be given for want of plea, answer, replication or other pleading," etc.—the expression "or other pleading" would cover a demurrer. In Story's Equity Pleadings a demurrer is treated as an equity pleading. It is treated as if demurrer, plea, answer, disclaimer, etc., are all pleadings. There may be a plea to the jurisdiction which is equivalent to a demurrer.

Upon the whole, I think that the demurrer was regularly filed and should not have been ordered off the file, and so this appeal is to be allowed.

TUCK, J. This is an appeal by the defendants, Charles Burpee, George G. King and Egerton R. Burpee, from the judgment of the Judge in Equity, ordering that the demurrers of these defendants be struck off the file.

It appears that the bill and interrogatories in this case were served upon the solicitors of Charles Burpee and George G. King, on the 16th day of December, 1887, and the same solicitors of Egerton R. Burpee, on the 4th day of May, 1888. No

plea, answer or demurrer was filed, and a copy thereof served on the plaintiff's solicitor within one month from such service, as required by cap. 49, sec. 28, Consol. Stat. Further time was not granted by the Judge in Equity or any other Judge, to the defendants, to put in a plea, answer or demurrer. Within ten days after a demand had been made, demurrers were filed and copies thereof served. On application of the plaintiff, an order was made by the learned Judge in Equity to set aside and have them taken off file, on the ground that they had been filed and served after one month from the time of service of bill and interrogatories had expired, without having first obtained a Judge's order. In making this order, the Judge followed, as he says, the practice of the High Court of Chancery in England, as it existed in the month of March, 1839, except in so far as it is altered by any Act of Assembly of this Province, or the practice of Court. Cap. 49, sec. 28, Consol. Stat., enacts that a demurrer must be filed within one month from the service of bill and interrogatories, and the learned Judge holds that there is no authority to file it after that, unless the time is extended by the order of the Court or a Judge.

1890.  
 BURPPE  
 v.  
 WETMORE.  
 Tuck, J.

Leaving out of the consideration 45 Vic. cap. 8, sec. 4, I think the Judge is right. That section enacts "that no notice for a motion to take a bill *pro confesso*, or to dismiss the same, be given or made for want of plea, answer, replication, or other pleading in any case, unless, after the time specified for delivery thereof, a demand thereof respectively be previously made in writing at least ten days, on the solicitor of the party from whom such answer, replication or other pleading (as the case may be), is required."

I think that this section, in the words "or other pleading (as the case may be)," includes, and was meant to include, a demurrer; and further, that it alters sec. 28, cap. 49, by extending the time for filing and serving a demurrer, to ten days after a demand has been made in the manner prescribed in the section. Where a party has failed to plead, answer, reply or demur in Equity, within the time named in any statute, section four provides in effect that no adverse motion shall be made against him, unless a ten days' demand has been previously

1890.  
BURPÉE  
v.  
WETMORE.  
Tuck, J.

made. Before 45 Vic., cap. 8, was passed, an order could not be made to take a bill *pro confesso* without the production of the clerk's certificate that no plea, answer or demurrer had been filed. Now, before this can be done, it must also appear that a ten days' demand in writing had been previously made. Well surely that must mean that a demurrer may be filed at any time within the ten days without a Judge's order. And if it can be, what possible difference can it make whether the matter comes before the Court on a motion to take a bill *pro confesso*, or to strike a demurrer off the file. Once admit that a demurrer may be properly filed without a judge's order after the month has expired, and within the ten days' demand, then, it seems to me, it follows that no judge has the power to strike it off, on the ground that it was improperly filed.

In so far as he refers to it, the Judge in Equity puts a different construction on section 4, and it is because I differ from him in that respect that I think this appeal must be allowed.

SIR JOHN C. ALLEN, C. J. This was an appeal from the decision of the Judge in Equity, setting aside demurrers filed by the appellants in this case, on the ground that they had been filed more than thirty days after service of a copy of the plaintiffs' bill and interrogatories, without leave of the Court.

It is not disputed that if the practice had continued as it was under the 28th sec. of cap. 49 of the Consol. Stat., the order of the Judge in Equity to take the demurrers off file was properly made; but it was contended that the Act 45 Vic., cap. 8, sec. 4, had altered the practice.

That section enacts "that no notice for a motion to take a bill *pro confesso*, or to dismiss the same, be given or made for want of plea, answer, replication or other pleading, in any case, unless, after the time specified for delivery thereof, a demand thereof, respectively, be previously made in writing at least ten days on the solicitor of the party from whom such answer, replication or other pleading (as the case may be) is required."

The 28th section of the Equity Act (Consol. Stat. cap. 49) enacts that if the defendant in a suit appears, a copy of the

plaintiff's bill and interrogatories shall be served on his solicitor; and that if no demurrer, plea or answer be filed, and a copy thereof served on the plaintiff's solicitor within one month from such service, a Judge may, at any monthly sitting of the Court, and on affidavit of the facts, and on production of the clerk's certificate of the filing of the bill and interrogatories, and that no plea, answer or demurrer has been filed, order that the bill be taken *pro confesso* against the defendant; provided that it is made to appear that fourteen days notice of the motion has been given to the defendant. Also, that the Judge may, on cause shewn by affidavit, grant further time to the defendant to put in a plea, answer or demurrer.

This section was copied substantially from the 7th section of the Act 17 Vic., cap. 18, relating to the Administration of Justice in Equity, which was in force when the case of *McCourt v. McCarthy* was decided, and which was also an application to take a demurrer off file because it had been filed after the time allowed by the Act.

I agree with the decision of the Judge in Equity that the 4th section of the Act 45 Vic., cap. 8, does not profess to alter the practice with reference to the time within which a defendant has a right to file a demurrer; and as the question in this case did not arise either on an application to take the plaintiff's bill *pro confesso*, or to dismiss it, it does not come within the provisions of that section. It is only by implication that that section can be held to alter the express provision of the 28th section of cap. 49, which applies to the time of filing demurrers, and to the adopted practice of the Court of Chancery in England; and therefore I think that the general words of section 4 of the Act 45 Vic., cap. 8, should not be construed as altering the established practice under the 28th section of cap. 49. The general rule that prior statutes are held to be repealed by implication by subsequent statutes if they differ, does not apply where the prior statute is a special one, unless there are special words to indicate that such was the intention, or unless such an intention appears by necessary implication. *Thorpe v. Adams* (1); *Reg. v. Champneys* (2). I think it cannot be said in

1890.

BURPEE  
v.  
WETMORE.  
—  
Allen, C. J.

(1) L. R. 6 C. P. 125.

(2) L. R. 6 C. P. 384.

1890. this case, either that there are any special words in the Act 45  
BURPÉE Vic. cap. 8, showing an intention to alter the practice relating  
v. to the filing of demurrers, or that it is shown by necessary im-  
WETMORE. plication that such was the intention. On the contrary, the  
express words of section 4 limit its application to motions to  
take bills *pro confesso* or to dismiss them. Full effect can  
therefore be given to the words of sec. 4 without in any way  
conflicting with the construction put by the Judge in Equity  
on sec. 28 of cap. 49, so far as it related to the question then  
before him.

FRASER, J., agreed with the majority of the Court.

WETMORE, J., not having heard the argument, took no part.

*Appeal allowed with costs.*



PALMER, APPELLANT, AND THE OCEAN MARINE INSURANCE CO., RESPONDENTS.

1890.

May 3.

*Insurance — Foreign corporation — Agent — Power to cancel policies — Action on promissory note given to foreign corporation — Proof of foreign corporation — Consol. Stat., c. 46, sec. 12.*

Evidence that the agent of a foreign insurance company received applications for insurance and forwarded them to the company; collected the premiums; received and delivered the policies, and settled and paid the losses, does not authorize him to cancel policies issued by the company.

Evidence that a foreign corporation was empowered to transact marine insurance, with the other powers incident to corporations, is sufficient to authorize them to sue on a promissory note given them for the premium on an insurance policy.

The State of Maine is a foreign state; and an Act of the Legislature of that State may, under the Consol. Stat., c. 46, sec. 12, be proved in this Province by a copy thereof, certified by the Secretary of the State, and under the seal thereof.

This was an appeal from the Saint John County Court.

The grounds of appeal and the argument of the counsel are sufficiently referred to in the judgments, and need not be given here.

October 17, 19, 1889. *E. McLeod, Q. C.*, argued in support of the appeal, and

*Seely, contra.*

*Cur. adv. vult.*

The following judgments were now delivered:

TUCK, J. This is an appeal from the Saint John County Court, where the learned Judge of that Court ordered a verdict for the plaintiffs (the respondents), for one hundred and two dollars and sixty cents.

The action is on a promissory note given for a premium of insurance.

In 1884, the defendant, Charles A. Palmer, was the owner of 38 shares of the barque "Orinoco," and Messrs. Whittaker Bros. were insurance agents doing business in Saint John, and acted as brokers or agents of the plaintiff company, as well as other

1890. companies. On the 31st of May, 1884, the defendant applied  
PALMER to Whittaker Bros. for \$3,500 insurance on the "Orinoco," that  
v. is \$1,500 with plaintiffs, and \$2,000 with the Phoenix Insurance  
THE OCEAN Company. In the application for insurance, the vessel was  
MARINE IN- valued at \$16,000.  
SURANCE Co.

Tuck, J.

The plaintiff company was incorporated by the laws of the State of Maine, one of the United States of America.

From the defendant's evidence, the policy of insurance was to attach from the time the vessel sailed, which proved to be the 14th day of June, and when the defendant heard of the sailing he informed Whittaker Bros. Some time between the first and eighth of August, 1884, and after he had told Whittaker Bros. that the vessel had sailed, the defendant signed the note in suit. Before and after the note had been given, the defendant had a conversation with Whittaker Bros. about the valuation of the vessel, and asked to have it altered on both policies to \$12,000. They made the required alteration in the Phoenix policy, and said that they would send the other forward and have it altered. The note was then left with them. Having received a note from Whittaker Bros. about the 18th day of August, 1884, he went to their office and was informed by them that the plaintiffs declined to decrease the valuation; and in answer to defendant's question, "What they would do then?" Whittaker said, "They, or he, (I cannot say which) will cancel." Defendant replied "All right," that he would pay the premium to the time the vessel sailed from Newport. Up to this time defendant had not had the policy in his possession, but had seen it. He never received it.

Defendant then went to Byron Taylor, and effected an insurance with him for \$1,500, at a valuation of \$12,000.

Objection was taken to the reception of a certified copy of the Act of the State of Maine incorporating the company, passed in March, 1832, certified by the Secretary of State of Maine, and under the seal of that State. The same objection was taken to the reception of a statute passed in 1852, containing the first Act, and also of a further statute passed in 1870, making the first Act perpetual, both certified the same as the first one. The objection taken at the trial was that the Court would not recognize the State of Maine as a foreign state,

within the meaning of section 12, cap. 46 Consol. Stat., which applies only to the United States generally. This objection was not pressed at the argument. It was simply stated. I think this evidence was properly received.

All the other objections are taken under the head of misdirection. It is contended first, that it does not sufficiently appear that the plaintiffs were incorporated to do marine insurance business, or to make a contract like this one. The allegation in the declaration is that the company is a foreign corporation, incorporated by the laws of the State of Maine, one of the United States of America, with power to sue and be sued. It is claimed that the declaration should have gone further, and that the purpose for which the company was formed should have been stated. I think that it is sufficient to state that the corporation is a foreign one with power to sue and be sued. It is necessary then (the foreign corporation having the right to enforce a contract in the Courts of this country), to prove that they are incorporated in the foreign country. That was done in this case by putting in evidence a certified copy of their Act of incorporation, by which it appeared that they were empowered to do a marine insurance business, together with the other powers usually incident to a corporation. The evidence shewed that they were an authorized company to do this business in their own country. The purpose of the company forms a part of a precedent given in Bullen & Leake, 24, but I can find no case, where it is held that this is essential to the validity of a declaration. That is rather a matter of proof.

Another objection was taken at the argument, that the plaintiffs should have shewn that they had obtained a license from the Minister of Finance, to carry on business in Canada. This point was not argued in the Court below, nor is it specially given in the grounds of appeal. But even if it was, I think it would not be tenable. In the statutes of Canada, 38th Vic. cap. 20, sec. 3, companies transacting in Canada ocean marine insurance exclusively, are excepted from the operation of the Act, and are not required to obtain licenses. This Act refers only to fire and inland marine insurance, and it does not appear that the plaintiffs transacted any such business.

1890.

PALMER

v.

THE OCEAN  
MARINE IN-  
SURANCE Co.

Tuck, J.

1890.  
PALMER  
v.  
THE OCEAN  
MARINE IN-  
SURANCE Co.  
Tuck, J

It is argued that the certificate put in evidence does not prove that the company had power to make a contract like this one; that several Acts relating to the plaintiff company were not put in evidence, and that those may shew that the company is restricted to doing business in marine only. I think that where a company has been duly incorporated, as this one has been, with the usual powers incident to such a corporation, it was not necessary to adduce evidence that the plaintiffs had the power to make this contract. It will be presumed that this power is given by the Act of incorporation. But apart from this consideration, the admission of the defendant himself by signing the promissory note, is proof, without the production of other evidence, that the corporation had power to make the contract. Then if there was any other Act of the legislature of the State of Maine, which restricted the power of this company to do business, it was incumbent on the defendant to have produced the Act.

I come now to the objections on the merits: and first as to whether or not the policy attached. The evidence is, that the defendant applied for the policy on the 30th day of May, 1884; that he did not know at that time when the vessel would sail, but he was to be insured from the time the vessel should sail. The vessel sailed on the 14th day of June, but Palmer did not hear that it had sailed until the 7th or 8th of August following. Before this time, and after application had been made for insurance, the defendant had complained that the valuation was too high, and asked to have it reduced to twelve thousand dollars. When Palmer heard the vessel had sailed, he gave the note in suit to Whittaker Bros., the insurance brokers, and at the same time told them he wanted the valuation reduced to \$12,000, and they promised to send the policy forward to have it altered. I have no doubt that when the defendant left the office of Whittaker Bros., on the 7th or 8th of August, or whatever other day it was after having given his note, his thirty-eight shares of the "Orinoco" were insured from the preceding 14th day of June, and had a loss occurred he would have been entitled to have been indemnified by this company. His contract with the company was concluded when he gave the note, and the valuation was allowed to remain as it had been.

The only point left is that of cancellation. What evidence is there of it? Only this, that on the 18th day of August the defendant, having received a note from Whittaker Bros., went to their office and was told by them that the plaintiffs declined to decrease the valuation; that the defendant asked what they would do then, and Whittaker said "They, or he, (defendant cannot say which) will cancel." Defendant then said "All right," and that he would pay the premium till the time the vessel sailed from Newport. It is argued that the questions of Whittaker's agency and the cancellation of the policy should have been left to the jury. I think there is no evidence of either, which the Judge of the County Court should have submitted. The evidence is clear enough that Whittaker Bros. acted only as brokers for the plaintiffs. They had no power to issue policies, nor to alter the valuation in a policy; much less had they the right to cancel a policy after it had been entered into. Their duty was to receive applications for policies, accept payment of premiums of insurance, and countersign policies when issued.

1890.

PALMER  
v.  
THE OCEAN  
MARINE IN-  
SURANCE CO.

Tuck, J.

The mere fact that Whittakers paid defendant a total loss on account of the plaintiffs, took risks on their account, sent policies to the assured, paid losses when they occurred, and had a sign over their doors, on which were written the words, "Ocean Insurance Company, Portland, Maine," is no evidence that they were clothed with the same power as the head office. If the Whittakers possessed such power, this fact should have been shown by the defendant. But they never claimed to have it. In this very case they had to send to the head office for the policy, and to return it there to have the valuation reduced. Just what their powers were as agents of this company, could have been readily shown by calling them as witnesses; and as this was part of the defendant's case, it was his duty to have produced this testimony. But neither of the Whittakers was called. Byron G. Taylor, another insurance broker, however, did give evidence on behalf of the defendant. It was through him that the defendant, on the 22nd day of August, 1884, effected an insurance with the India Insurance Company on the bark "Orinoco," in place of that, as he says, in the plaintiff company. Mr. Taylor says that he repre-

1890.  
 PALMER  
 v.  
 THE OCEAN  
 MARINE IN-  
 SURANCE Co.  
 Tuck, J.

sents the Ocean Insurance Company at Saint John now, and that he is their sole broker in the Maritime Provinces. On cross-examination, he says that he merely receives the applications, and the company issues the policies. In answer to the question, "Have you any power to alter or cancel any policy without authority from the head office?" he says: "I am simply the broker, not the agent, of the plaintiffs." He says also that he has "no authority to cancel or alter any policy without special instructions from the company as to that particular policy." Had either of the Whittakers been called, he would probably have given like testimony. I think, then, the evidence shows that the Whittakers were merely brokers without any special powers. Mr. Palmer's evidence is, that Whittaker said, "They—or he—will cancel," but he cannot tell which was said. If it was the plaintiffs who were to cancel, it is clear they never did so; and if it was the broker, then they had no power. In *Xenos v. Wickham* (1), which was an action on a policy of insurance, Lord Cranworth says: "It is no part of the ordinary duty or power of a broker to cancel agreements once validly and completely entered into." In *Linford v. The Provincial Horse and Cattle Insurance Company* (2), the Master of the Rolls says "that Webb, the agent of the Company, was competent to do all acts within the scope of the ordinary duty of an agent of an Insurance Company; but that it was not the ordinary duty of such an agent to grant, or contract to grant, policies of assurance, and that no special authority had been proved." Here no special authority on the part of Whittaker Bros. to cancel has been proved; and whatever evidence has been given disproves such authority. The same doctrine is laid down in *Story on Agency*; and *Tate v. Citizens' Mutual Fire Insurance Company* (3), is to the same effect.

For these reasons, in my opinion, this appeal must be dismissed with costs.

SIR JOHN C. ALLEN, C. J. The principal question in this case is, whether a policy of insurance which had been entered into between the appellant (defendant below) and the respon-

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(1) L. R. 2 H. L. 296.

(2) 34 Beav. 291.

(3) 13 Gray 79.

dents (plaintiffs below), had been cancelled. The other objections taken at the trial were not much relied on at the argument.

The respondents are a foreign company doing marine insurance business in this Province—their agents here being Messrs. Whittaker Brothers, insurance brokers. They were also the agents of The Phoenix Insurance Company—another foreign corporation.

1890.  
PALMER  
v.  
THE OCEAN  
MARINE IN-  
SURANCE Co.  
Allen, C. J.

[His Honor here stated the facts, as above.]

The only evidence of the nature of Whittakers' authority as agent of the plaintiffs was, that in 1883 Whittakers took a risk for the plaintiffs and sent the policy to the defendant, and a loss having occurred, Whittakers paid it. That all the defendant's transactions with the plaintiffs were done through Whittakers; that he had effected insurances with the plaintiffs for other people in that way; that he had arranged settlement of losses with them as agents for the plaintiffs, which were carried out; and that he would make applications for insurance, pay premiums and settle losses with Whittakers.

I think the defendant failed to shew any authority in Whittakers to cancel the policy. They would not take the responsibility of altering the valuation, but told the defendant they would send it to the head office. What they said about cancelling the policy amounts to nothing, unless they had a general authority to act for the plaintiffs, which was not shewn. Story on Agency, sec. 126: An agent of an insurance company to receive applications for insurance and premiums, and to transmit policies, has no authority to waive notice of assignment of a policy. *Tate v. Citizens' Mutual Fire Insurance Company* (1). If they said that they would cancel it, there is no evidence that they had any authority to do so; and if they said that the company would cancel it, it amounts to nothing more than their opinion that the plaintiffs would do so. Angel & Ames on Corporations (10th ed.), sec. 309.

In *Xenos v. Wickham* (2), it was held that it was no part of the ordinary duty or power of a broker to cancel agreements once validly and completely entered into.

I think there was a valid contract of insurance entered into

(1) 13 Gray 79.

(2) L. R. 2 H. L. 296.

1890.  
PALMER  
v.  
THE OCEAN  
MARINE IN-  
SURANCE Co.  
Allen, C. J.

in this case, when the company, upon information that the vessel had sailed, issued the policy, though it remained in Whittakers' possession. What took place when the defendant applied to Whittakers to reduce the valuation on the policy, and when the company refused to do so, which was communicated to the defendant, shows that both parties treated it as a binding contract at that time. If that is the case, what evidence is there to shew that Whittakers had any authority to put an end to it?

The evidence of what their powers were, is by no means clear. There is nothing to shew that they could bind the company to issue a policy, or that they could do more than receive applications for insurance, which would be subject to the approval of the company; as Taylor, another insurance agent in St. John, a witness called by the defendant, said he did.

In *Linford v. The Provincial Horse and Cattle Insurance Co.* (1), it was held that the agent of an insurance company, conducting their insurance at a branch office, had no authority by the mere fact of such agency, to enter into a contract to grant a policy of insurance without the sanction and approbation of the company.

The defendant knew that Whittakers had no authority to issue policies or to alter them; how then can it be successfully contended, without any evidence of the extent of their authority, that they had power to cancel a policy?

It was contended that the defendant had altered his position by effecting another insurance on the vessel, in consequence of Whittakers' statement that the policy would be cancelled; and therefore the company was estopped from saying that the policy was not cancelled. But this depends upon the question whether Whittakers had power to cancel it. Their saying that it would be cancelled is not sufficient.

Another argument was, that the company kept the policy. But they also kept the defendant's note; and it seems rather improbable that he should have left the note with the company if the contract was at an end.

As to the objection that the incorporation of the plaintiffs was not proved—that it should have been certified under the

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(1) 10 Jur. N. S. 1066; 84 Beav. 291.



seal of the United States—I think there is nothing in that objection. The Act (Consol. Stat. cap. 46, sec. 12) requires that the document sought to be proved should purport to be sealed with the seal of the foreign State to which the original document belongs. The State of Maine clearly is a Foreign State.

The objection that the company could not sue on the note was not much pressed. I cannot see any objection to it, there being nothing opposed to it in the Act of incorporation. See *Angel & Ames on Corp.* (10th ed.), sec. 266. The note was only the evidence of a debt due from the defendant to the plaintiffs.

The remaining objection was, that the question whether Whittakers had authority to cancel the policy should have been left to the jury. I think there was an entire absence of any evidence on that point to leave to the jury.

I think the appeal should be dismissed.

WETMORE and KING, JJ., concurred.

PALMER and FRASER, JJ., took no part.

*Appeal dismissed with costs.*

1890.  
PALMER  
v.  
THE OCEAN  
MARINE IN-  
SURANCE Co.  
Allen, C. J.

1889.

## O'LEARY v. THE PELICAN INSURANCE COMPANY.

October 11.

*Marine Insurance—Policy—Prohibitory clause—Waiver—Sale of vessel by master—Stringent necessity—Constructive total loss—Notice of abandonment—Acceptance of—Breach of Warranty—Restoration of ship—Admiralty charts—Names and location of places—Judicial notice of—New trial—Discovery of new evidence.*

A condition of a policy of marine insurance,—after prohibiting the vessel from carrying in bulk, except under certain specified restrictions—declared as follows:—"Prohibited from loading lime, from the river and gulf of St. Lawrence (defining the bounds of the gulf, seaward), Northumberland Straits and Cape Breton, between October 31st and April 25th; permitted however to use gulf ports in Nova Scotia proper, up to November 15th, and the ports of Sydney, C. B., and Pictou, N. S., until November 25th and March 31st; from Newfoundland between November 25th and March 31st: from ports in Greenland or Iceland or being engaged in sealing; from the coast of Labrador, between September 15th and May 15th:"

*Held*—that the prohibition was not limited to the loading of lime at the ports mentioned within the specified dates, but applied to the use of the prohibited waters, for any purpose during those periods.

The master of a vessel has no power to sell her so as to affect the insurers, except under circumstances of stringent necessity.

In order to convert that which was a constructive total loss at the time notice of abandonment was given, into a partial loss, the ship must either have been restored to the owner before the commencement of the action, or be in a position to be restored. (Per King and Tuck, JJ.)

Acceptance of notice of abandonment must be by some unequivocal act. Receipt of notice of abandonment, by the agent of an insurance company, and his statement that he would forward it to his principal, and his belief that the loss would be paid, does not amount to acceptance of abandonment.

The Court will take judicial notice of the geographical position and names of places laid down in Admiralty Charts.

Where a policy of insurance required that an action against the underwriters should be brought within a year after the loss claimed for, and a writ was issued within the time, but the copy having been served on the wrong person, it was returned by the officer to the attorney who issued it, and he sent another copy, which was properly served—though after the year:

*Held*—Per Tuck, J., that the suit was commenced when the writ was first sent to the sheriff to be served.

Plaintiff obtained a verdict in an action against an insurance company, leave having been reserved to defendant to move to enter a non-suit, on the ground that there had been a breach of warranty by the plaintiff. On hearing the motion for that purpose, the defendant's counsel stated the existence of a letter in the plaintiff's possession, which the Court thought might operate as a waiver of the breach of warranty, relied on as a ground of non-suit; and he also admitted that the plaintiff's counsel was not aware of the existence of the letter, at the trial. The Court (Palmer, J., dissenting), granted a new trial on payment of costs.

This was an action on a policy of insurance upon the barque "C. S. Parnell," tried before His Honor Mr. Justice Tuck, at

the Kent Circuit in September, 1888. A verdict was found for the plaintiff, with leave reserved to the defendants to move for a nonsuit. 1889.

O'LEARY  
v.  
THE PELICAN  
INSURANCE  
Co.

June 18, 1889. *C. A. Palmer* moved for a nonsuit pursuant to leave reserved, or, failing that, for a new trial or a reduction of the verdict.

*Barker, Q. C., contra.*

The material facts as they appeared at the trial, and the arguments of the counsel, are sufficiently referred to in the judgments and need not be given here.

*Cur. adv. vult.*

The following judgments were now delivered :

TUCK, J. This action is brought on a policy of marine insurance, whereby the defendants, through their agents, Messrs. Knowlton Bros., at Saint John, caused the plaintiff to be insured two thousand dollars on the bark "C. S. Parnell," for twelve months from the first day of September, 1886. In November, 1886, this vessel was at Kingston, Kent County, loading with deals for Liverpool. Richibucto, in the County of Kent, is what is called a "bar harbor," so that when a vessel is loaded down to fourteen or fifteen feet inside the bar, any additional loading must be done outside the bar. As the "C. S. Parnell" had a draft of at least seventeen feet when loaded, her loading had to be completed outside the bar. This is described by the plaintiff as being an exposed place, in the Straits of Northumberland, going towards the Miramichi. There is a sand bar, the sand on which varies some years in depth, according to the storms. It is very dangerous. It has a short turn going out, so that you have to go nearly around the compass to get out. This is a very dangerous place ; is exposed to southern, north-east and easterly storms, and there have been several wrecks there. The vessel, being partially loaded, in going outside to finish loading, got on the south side of the bank, on the ninth day of November, 1886, and came off on the tenth November. She could not get over the bar that

1889.  
O'LEARY  
v.  
THE PELICAN  
INSURANCE  
Co.  
Tuck, J.

night, and was driven up on the beach by a severe easterly storm. The vessel is described as being stern on to the beach; there were over ten feet of sand at her stern at low water; there is a rise and fall of the tide at that place of only four feet; at low water one could go to her in his boots, without wetting his feet; and at high water there were about eight feet of water at the bow. The tide ebbed and flowed right through the vessel. She had a hole in her, and was full of water; her decks were started, and she was hogged. A survey was called, and the vessel was condemned and sold. On the 15th or 16th November, 1886, Mr. Joseph Sullivan was sent to Richibucto from Saint John to look after the interests of the Pelican Insurance Company, and took with him a letter from Knowlton to the plaintiff. In giving evidence, Sullivan says that his opinion agreed with the recommendation of the surveyors that the vessel should be sold. He says also that he could not see any way, at that time of year, to get the vessel off without costing the owners more than she was actually worth. In fact, it was not practicable at all. George McInerney, a barrister-at-law, in his evidence, says that he knows the locality well; that he remembers one fall when eight wrecked vessels were lying there, and during the last twenty years he knew of from twenty to thirty vessels being wrecked there. At one time an iron ship went on about mid-summer, and the next year she was completely out of sight in the sand; there are lots of the bones of vessels lying there. One can see their sides sticking up in the sand, but generally they have gone out of sight and to pieces. One vessel, within ten yards of the "C.S. Parnell," was imbedded to her beams in the sand. The sand there is a shifting sand; shifts on the bar, so that it would be at one course at one time, and another course at another time of the year. The sand drifts just like snow, and shifts along the beach, so that it is almost impossible to stand in consequence of the drift of the sand.

A notice of abandonment of the vessel was received from the plaintiff by Knowlton Bros. Proofs of loss were also sent to Knowlton Bros.

The vessel was sold on the twenty-third day of November, to Edward Lantalum, for two hundred and fifty dollars.

In the following spring the "C. S. Parnell" was got off, taken to Pictou and repaired; and was running at the time the action was brought, and in the summer of 1888.

1889.

O'LEARY

v.

THE PELICAN  
INSURANCE  
Co.

Tuck, J.

Some time in November, and after the sale, Knowlton told witness, that he had received proofs of loss and recommended payment. In January, 1888, the plaintiff asked Knowlton if he had forwarded the papers, who told him then for the first time, that he was not acting for the company, but Whittaker Bros. were. Plaintiff then went to Whittaker Bros., who told him that they had sent the papers off, and recommended payment.

At the trial, the jury in answer to questions put by the Court, said: First, that under the circumstances of the case, according to the evidence, the master of the "C. S. Parnell," acted as a prudent man, in the exercise of a sound judgment, when he sold the vessel in November, 1886. Second, that the defendants, through their agent, Knowlton or Whittaker, accepted the abandonment of which they had notice. And third, that the necessity for the sale was concurred in by Sullivan.

A motion is now made for a nonsuit, pursuant to leave reserved; or for a new trial; or to reduce the verdict to nominal damages.

In the policy, there is this clause: "Prohibited from loading lime, from the river and Gulf of St. Lawrence (a line drawn from Cape Ray to Cape North and across the Gut of Canso, at the northern entrance thereof, being considered the bounds of the Gulf of St. Lawrence, seaward), Northumberland Straits and Cape Breton, between October thirty-first and April twenty-fifth; permitted, however, to use Gulf Ports in Nova Scotia proper, up to September fifteenth, and the ports of Sydney, C. B., and Pictou, N. S., until November twenty-fifth; from Newfoundland, between November twenty-fifth and March thirty-first; from ports in Greenland or Iceland, or being engaged in sealing; from the coast of Labrador between September fifteenth and May fifteenth." I find in the ordinary printed forms of policy of this company (which I have had an opportunity of seeing), after the words "loading lime," the following words, "or more than registered tonnage of marble,

1889.  
 O'LEARY  
 v.  
 THE PELICAN  
 INSURANCE  
 Co.  
 Tuck, J.

stone, slate, lead, pig iron, scrap iron or bloom, steel, phosphate, iron or copper ores, either or in any combination," and then a semi-colon. A black line has been drawn through these words and the semi-colon in the present policy, so that they are completely obliterated. One of the grounds for a nonsuit is, that the loss, having occurred after the first day of November, is not within the terms of the policy. To this, two answers are made. First, the plaintiff says that the word "prohibited" in the clause, relates to loading lime from the Gulf of St. Lawrence, and not to the use of the Gulf. Second: that even if it refers to the use of the Gulf, there is no proof that the vessel was, when the loss took place, within the prohibited line named in the policy.

As to the first answer, I think, after a careful consideration of the clause, that "prohibited" governs the words "from the river and Gulf of St. Lawrence," as well as the words "from loading lime." That is, the vessel is prohibited from loading lime after the thirty-first day of October, and is also prohibited from the use of the Gulf after that date. Although the construction of the sentence is bad, yet the meaning is sufficiently clear, especially when the whole clause is read together. The difficulty has arisen chiefly from the erasure of certain words. Let those words be inserted and the difficulty will be removed. For it would be absurd to interpret the clause as meaning that the vessel is prohibited from loading lime, or more than registered tonnage of marble, stone, steel, phosphate, scrap iron or bloom, iron or copper ores, from the river and Gulf of St. Lawrence, inasmuch as cargoes or parts of cargoes of such material, or the greater part of it, are never loaded from the St. Lawrence. Another evidence that the vessel is prohibited from the Gulf after the 31st October, is found in the use of the words which follow "April twenty-fifth," namely, "permitted, however, to use Gulf ports in Nova Scotia proper, up to November fifteenth." This means clearly that whilst the vessel may use the gulf ports of Nova Scotia up to the fifteenth of November, it is not permitted to use the other gulf ports after the thirty-first day of October. Again, if the plaintiff's construction is correct, and the clause means that the prohibition is only from loading lime from the river and Gulf of St. Lawrence, then the

vessel is not prohibited from ports in Greenland or Iceland, but only from loading lime from those ports: not prohibited from the coast of Labrador between September fifteenth and May fifteenth, but only from loading lime from that coast between those dates. It seems only necessary to state this to show its absurdity. I think the second answer is not tenable. At the trial the plaintiff did not pretend to say that the vessel was not within the prohibited line. His argument then was that the line was not prohibited. The plaintiff himself says that outside the harbor, where the vessel was to finish loading, was in the Straits of Northumberland, which, I have always understood, formed a part of the Gulf of St. Lawrence. Besides, by the terms of the policy, Northumberland Straits are prohibited by name during the same period as the Gulf of St. Lawrence is. John Newman, the master, in his evidence says, that from the position where the vessel was anchored, the first land in a north-easterly course would be the Island of Anticosti, about two hundred miles distant; and that the sea, bay or water there is called the Gulf of St. Lawrence.

1889.  
O'LEARY  
v.  
THE PELICAN  
INSURANCE  
Co.  
Tuck, J.

It is argued that there is no proof of loss and adjustment thereof, and proof of interest, as required by the policy. The proof of loss and interest was complete, and no adjustment was necessary in accordance with English practice. There was nothing to adjust, according to the usage of Lloyds. The "C. S. Parnell," her tackle and apparel, had been sold and brought so much money, the amount being known. All then to be done was to use the money available from the sale, to reduce the amount payable by the face of the policy. An average adjuster was not required for this purpose. It was a simple sum in arithmetic.

Then it is said that the vessel was not a constructive total loss, in accordance with the conditions of the policy; or, if she was, there is no evidence which proves it. The condition referred to reads as follows: "And the insurers shall not be liable for a constructive total loss of the vessel, in case of abandonment or otherwise, unless the cost of repairing the vessel, under an adjustment as of a partial loss, according to the terms of this policy, shall amount to more than half of its value, as declared in this policy." I think that clause has no

1889.  
O'LEARY  
v.  
THE PELICAN  
INSURANCE  
Co.  
Tuck, J.

application to this case. At the time the vessel was sold, it was apparently impracticable, in view of the season of the year, and of the fact that ice was about to form, that she could be got off at all. Sullivan says that he could not see any way to get the vessel off, without costing the owners more than she was actually worth. Now, Sullivan was the man sent by the agents of the underwriters to Richibucto to look after their interests. He acquiesced in the sale, because he says that he agreed in the conclusion to which the surveyors came. The agents, having received notice of abandonment, acted upon it, and acquiesced in the sale, when they recommended payment of the claim. Not that this recommendation to pay created an obligation of the principal to pay, but it is some evidence that the agents, so far as in their power, accepted the abandonment, and acknowledged that the sale was justifiable. Sullivan, who was the special agent of the underwriters to look after their interest in the wrecked vessel, had come to the same conclusion. How, then, can it be said, with success, that the company is not liable for a constructive total loss, on account of this clause in the policy? Under the evidence, there can be no question that the cost of repairing the vessel, under adjustment as of partial loss, would amount to more than half its value, as declared in the policy. Sullivan, the company's own agent, says the cost of repairing would be more than it was really worth. Under such circumstances, it would have been idle for the owners to have asked for tenders to repair the vessel, and no adjustment as of partial loss could have been made. *Gerow v. The Royal Canadian Assurance Company* (1), decided by this Court, is an entirely different case. There, the vessel, having sprung a leak, put into Valparaiso. A survey was held, and tenders were asked for repairing. Tenders were put in, and this Court determined that the cost of repairing the vessel, from the evidence, would not have amounted to more than half its declared value, and therefore the plaintiff could not recover. That decision is not an authority in this case, because the circumstances are different. While I think that the sale of the "C. S. Parnell" was justifiable, I cannot agree with the contention of the plaintiff's

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(1) 27 N. B. Rep. 513.



counsel, that the stringency was such as to justify the sale, so that there would be an absolute total loss, for which the defendants would be liable without notice of abandonment. The facts do not show that the ship was in such imminent danger of immediate destruction, that a sale appeared to afford the only reasonable hope of saving any part of her value. When the jury found that the master acted as a prudent man, in the exercise of a sound judgment, when he sold the vessel, they did not say that there was such urgent necessity as would justify a sale without notice of abandonment. I recognize that there may be a total loss without abandonment, when there has been a right sale, caused by urgent necessity, with full proof that every thing was done *optima fide*, and for the real benefit of all concerned. This is the doctrine of *Roux v. Salvador* (1); *Knight v. Faith* (2), and *Farnworth v. Hyde* (3). In those cases, the urgent necessity was found by a jury upon facts as to the imminent danger, which justified the finding. There is no such finding by a jury here, and if there had been, the facts do not warrant it. On the contrary, the cause was tried as for a constructive total loss, where it would cost more to get the vessel off and repair it, than its value would be when repaired; and where a prudent owner, uninsured, would decline any further expense in getting the vessel off and putting it in a state of repair.

It appears that the writ in this cause was issued on the 3rd day of November, 1887, with instructions to the Sheriff of Saint John, by letter from Messrs. McInerney & Carter, plaintiff's attorneys, to serve on Knowlton, as agent of the defendant company. When the deputy sheriff served Knowlton, he said that he was not agent; whereupon the deputy returned the writ of summons to the plaintiff's attorneys. They sent him back the same writ on the 17th November, with a copy to serve on Whittaker, who was agent. It is claimed by the defendants that this was a new issue of the writ, and if so, the action was not commenced within the twelve months next after the loss occurred. There is nothing in this objection. I think there was but one issue of the writ; that of 3rd November. Giving a copy to Knowlton was useless, for he was not

1889.

O'LEARY  
v.  
THE PELICAN  
INSURANCE  
CO.

Tuck, J.

(1) 3 Bing. N. C. 266.

(2) 15 Q. B. 649.

(3) 18 C. B. 20 N. S. 835.

1889.  
O'LEARY  
v.  
THE PELICAN  
INSURANCE  
Co.  
Tuck, J.

agent. Another copy was therefore necessary to serve on Whittaker, and it is immaterial whether that copy was made when the original was in the office of the plaintiff's attorneys, or in the office of some other person. The suit was commenced on the 3rd November.

Another point argued is that the plaintiff's direction to the master to act in accordance with the surveyors' report, was such a direction as to avoid the sale, and prevent the plaintiff from recovering for a total loss. I think the whole evidence shews that the master was left to act according to his best judgment and that the sale was his own act. In one place he says that he thinks O'Leary said that it was best to act as the surveyors recommended; in another, he says that O'Leary told him that he had to act according to the survey, if he thought it was all right. It is clear that all the parties acted in good faith.

There is a further important contention by the defendant company, to the effect that the plaintiff cannot recover for a constructive total loss, because when this action was brought and at the time of trial, the vessel was in good seaworthy condition, sailing the seas, and that the circumstances which existed when the sale was made and notice of abandonment given, must continue to exist when the action is commenced. I think this is not an accurate statement of the law. The principle of the decided cases does not go to that extent. In order to convert that which was a constructive total loss at the time notice of abandonment was given, into a partial loss, the ship must either have been restored to the owner, or be in a position to be restored. Suppose there had been no sale of the vessel here, and in the spring of 1887, it had been got off by the underwriters, but in an utterly wrecked condition, so that the cost of repairing would be greater than the value of the ship after being repaired, the owner would be justified in refusing to accept the vessel, and would have a right to bring his action as for a total loss. So where notice of abandonment has been given, and not accepted, which abandonment the circumstances then existing justified, and the ship has been sold and afterwards repaired by the purchaser, so that she is in good seaworthy condition at the time a suit is brought, but not

in a position to be restored to the assured, an action may be maintained for a total loss. A vessel may be driven ashore and liable to become a total loss, so that it would be competent for the owner to give notice of abandonment, and for the underwriters to refuse to accept it. If then a survey be held, and the vessel be condemned, but before action is brought the vessel is in safety, and capable of being repaired at a less cost than her value when repaired, and of being restored to her owner; in such case the insured is entitled to recover only for a partial loss. That was the case of *Taylor v. Smith* (1). Ritchie, C. J., says: "The assured cannot recover for a total loss if the ship be restored before he commences his action, in such a state that he may reasonably be expected to take possession of it." Restoring the ship in a state fit to be repaired, was evidently in the mind of the learned Chief Justice when he prepared this judgment. The right to recover depends upon the state of things existing at the time of action brought; but before the owner will be deprived of his right to recover for a total loss, there must be a restitution of the ship, or the underwriter must be in a position to restore it. The owner's right to recover is not necessarily taken away because the ship is in existence and sailing the seas when action is brought. I can find no English authority for the contention that the assured ceases to be in a condition to be indemnified for a total loss, simply because the ship is sailing when he commences his suit.

In Arnould on Marine Insurance the law is thus stated: "But if, before the assured has gone into court, there be a restitution of his property, he ceases to be in a condition requiring to be indemnified against a total loss; and his notice of abandonment, though once valid, is obliterated to the eye of justice by the state of facts which have subsequently supervened." Again Mr. Arnould says: "But though the loss be *prima facie* total, as in the case of capture, and notice of abandonment have been given, still for the same reason, if there be restitution before action commenced, occasion for such indemnity no longer exists in respect of the fact, and any foundation for asserting the right by legal claim is consequently gone."

1889.

O'LEARY  
v.  
THE PELICAN  
INSURANCE  
Co.

Tuck, J.

(1) 1 Han. 119.

1889.  
O'LEARY  
v.  
THE PELICAN  
INSURANCE  
Co.  
Tuck, J.

This principle is recognized in *Bainbridge v. Neilson* (1), and *McIver v. Henderson* (2), and is consistent with the decisions in *Hamilton v. Mendes* (3), and *Godsall v. Boldero* (4). In *Holdsworth v. Wise* (5), Bayley, J., in delivering judgment says: "There are cases which shew that the mere existence of a ship, after a total loss and abandonment, will not reduce it to a case of partial loss. The ship must be in *esse* in this kingdom under such circumstances that the assured may, if they please, have possession, and may reasonably be expected to take it." In *Dean v. Hornby* (6), Wightman, J., says: "The question here is, whether that which was at one time a total loss has been converted into a partial one. To make that so, the circumstances ought to be such as to restore the possession to the assured, or to afford them the means of obtaining possession."

What is said by Lord Blackburn in *Shepherd v. Henderson* (7), and *Rankin v. Potter* (8), is not opposed to these decisions, nor is the dictum of Mr. Justice Strong in *Providence Washington Ins. Co. v. Corbett* (9). If the sale by Newman, master of the "C. S. Parnell," in November, 1886, was a valid one, as I think it was, then the right of the plaintiff to recover for a total loss could not be taken away without restitution of the ship.

I think the plaintiff may recover interest as damages under the statute, without a count for interest.

It was admitted by Mr. *Palmer*, defendants' counsel, at the argument, that on the third day of November, 1886, Knowlton Bros., as agents, wrote a letter to the plaintiff giving him permission to use the Gulf of Saint Lawrence for the voyage for which the vessel was then being loading. Now if my construction of the clause relating to prohibited ports is the correct one, and the vessel was shown to have been in the Gulf of Saint Lawrence when the loss occurred, the plaintiff's verdict cannot stand, unless the jury were justified, under the evidence, in finding that the defendants, through their agent, Knowlton or Whittaker, accepted the notice of abandonment. If they did, it operated as an immediate cession of the property to them,

(1) 10 East 329.  
(2) 4 M. & S. 576.  
(3) 2 Burr. 1198.

(4) 9 East 72.  
(5) 7 B. & C. 794.  
(6) 3 E. & B. 180.

(7) 7 App. Cas. 49.  
(8) L. R. 6 H. L. 89.  
(9) 9 Can. S. C. R. 256.

and made the abandonment at once indefeasible, as it is said in one of the cases. 1889.

As there is some doubt, however, whether the act of the agents, Knowlton and Whittaker, in recommending payment of the claim, and the concurrence of Sullivan in the sale are sufficient evidence that the defendants accepted the notice of abandonment; and as the rulings at *Nisi Prius* as to the construction to be put on the different conditions of the policy were all favorable to the plaintiff, I am of opinion that the justice of this case will be met by sending it down for a new trial; but I do not think the terms of paying costs should be imposed.

O'LEARY  
v.  
THE PELICAN  
INSURANCE  
Co.  
Tuck, J.

FRASER, J. I agree that there should be a new trial, but upon payment of costs.

KING, J. This is an action upon a policy of insurance on the barque "C. S. Parnell." At the trial before Mr. Justice Tuck at the Kent Circuit the plaintiff obtained a verdict as for a constructive total loss, and this is an application for a nonsuit pursuant to leave, or for a new trial, or reduction of the verdict.

The policy was for a period of twelve months, and was effected by defendants' agent at Saint John. The usual printed forms of policies of the company contained the following prohibitory clause, from which, however, the portion now set in italics was struck out at the time of the execution of the policy in question:

"Prohibited from carrying in bulk, except grain warranted to be loaded under the inspection of a surveyor to the Board of Marine Underwriters at port of shipment; and the vessel not to proceed to sea with grain in bags or bulk on board without a certificate from such inspector that the vessel is properly laden and fitted out for her intended voyage; prohibited from loading lime, *or more than her registered tonnage of marble, stone, slate, pig iron, scrap iron or bloom, steel, phosphate, iron or copper ores, either or in any combination*; from the River and Gulf of St. Lawrence, a line drawn from Cape Ray to Cape North, and across the Gut of Canso, at the

1889.  
O'LEARY  
v.  
THE PELICAN  
INSURANCE  
Co.  
King, J.

northern entrance thereof, being considered the bounds of the Gulf of St. Lawrence seaward, Northumberland Straits and Cape Breton, between October thirty-first and April twenty-fifth; permitted however to use Gulf ports in Nova Scotia proper up to November fifteenth, and the ports of Sydney, C. B., and Pictou, N. S., until November twenty-fifth; from Newfoundland between November twenty-fifth and March thirty-first; from ports in Greenland or Iceland, or being engaged in sealing; from the coast of Labrador between September fifteenth and May fifteenth."

At the time of the loss, the vessel was at the mouth of the Richibucto River, and so was using what is known as either the Gulf of St. Lawrence or Northumberland Straits between October thirty-first and April 25th, viz., on November the eleventh. Upon the maps, the waters between New Brunswick and Prince Edward Island are named Northumberland Straits, although doubtless within the Gulf of St. Lawrence; and in chapter 2 of the Consolidated Statutes, the Gulf of St. Lawrence is named as the easterly boundary of the counties of Northumberland and Kent.

It was stated upon the argument that there had been some correspondence between the assured and the company respecting permission to make later use of these prohibited waters, but this was not known to plaintiff's counsel at the trial, and the correspondence is unfortunately not before us. Upon the trial the counsel for the plaintiff contended (and the learned Judge was inclined to agree with him) that the prohibition was not against the use of the ports in question within the time named, but merely against the loading of lime from such ports within such times. But this is obviously a wrong construction. Persons engaged in shipping and marine insurance know that certain cargoes are deemed extra hazardous, either absolutely or unless carried under certain restrictions; and also that certain waters are extra hazardous at certain seasons. The plaintiff's argument depends upon the omission to repeat the word "prohibited" before the words "from the river and gulf of St. Lawrence, Northumberland Straits," etc.; but there is the like omission in the case of every one of the succeeding clauses relating to Newfoundland, Greenland, Iceland, Labrador and

seal fishing; and a mercantile man could not seriously think that all the prohibitory provisions of this policy as to times and places are mere conditions imposed upon the loading of lime. Imagine two business men stipulating specially in such a policy as this against the carrying of lime from Greenland and Iceland and from the coast of Labrador! What is prohibited is: Firstly, the carrying of grain except under certain restrictions; secondly, the loading of lime; thirdly, the use, between October 31st and April 25th, of the river and Gulf of St. Lawrence, Northumberland Straits and Cape Breton, with permission however to use gulf ports in Nova Scotia proper up to November 15th, and the ports of Sydney, C. B., and Pictou, N. S., until November 25th; fourthly, the use of Newfoundland ports or waters between November 25th and March 31st; fifthly, the use of ports in Greenland or Iceland, or being engaged in sealing; sixthly, the use of the coast of Labrador between September 15th and May 15th. The clauses relating to certain ports and waters at certain seasons are independent clauses, but governed, however, by the antecedent words of prohibition in accordance with an ordinary use of language. This was very plain in the printed words as they stood before the striking out of the clause relating to the loading of more than the registered tonnage of stone, iron, etc.; and I do not think it less clear in the words as they stand. I may only add that the terms in which liberty is given to use certain ports of Nova Scotia for a longer period than that previously named, show that the antecedent clause related to the prohibition of *any and all use* of the waters named therein during the prohibited season.

The defendants were therefore, upon the case as it stood at the trial, and in the absence of proof of a permission to use the prohibited waters, entitled to succeed upon the ground of breach of warranty, which was duly pleaded, unless the breach of warranty had been waived; for in *Provincial Insurance Co. v. Leduc* (1) it was held that acceptance of abandonment waives a breach of warranty. Then was there an acceptance by defendants of plaintiff's abandonment? The jury have found that there was. In my opinion there is an entire absence of evidence to support such finding.

1889.

O'LEARY  
v.  
THE PELICAN  
INSURANCE  
Co.

King, J.

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(1) L. R. 6 P. C. 224.

1889.  
 O'LEARY  
 v.  
 THE PELICAN  
 INSURANCE  
 Co.  
 King, J.

The material facts are as follows: On the 9th November, 1886, the vessel, partially loaded with deals, was proceeding across the bar at the mouth of the Richibucto river in order to complete her loading outside, when she grounded upon the bar. On the 11th she came off and was anchored in the channel when a gale sprang up and she was driven high up upon the bar and became partially embedded in the sand and very much strained and broken. As soon as he could get ashore, the master returned to Richibucto where the owner resided, and a survey was called. At the survey, one Sullivan, a shipwright of experience, who had been sent from St. John by the defendants' agent there to inspect and report, was present. The survey resulted in a recommendation that the vessel be sold. The report of the surveyors was sent to the defendants' agent at St. John, and the plaintiff about the same time gave notice of abandonment to the defendants through their agent at St. John. The vessel was sold at public auction and brought \$250. The jury have found that the master in selling acted as a prudent man and in the exercise of a sound discretion. Sullivan's testimony agrees with that of the surveyors as to the extent of damage, the imminent danger of breaking up or becoming immovably imbedded in the sand. The vessel was got off the following spring by the purchaser and repaired at Pictou, and at the time of action brought was running; but the fact of the vessel having been got off and repaired is not inconsistent with the existence of stringent necessity for a sale at the time the vessel was sold. A master is clothed with implied authority to sell in the absence of the owner, provided he acts *bona fide* and for the benefit of all concerned and under circumstances of stringent necessity. "What a prudent owner would have done under the circumstances, if uninsured, may illustrate the question as to how far there was a stringent necessity for selling, yet the rule is that there must be a stringent necessity." *Cobequid Marine Insurance Co. v. Barteaux* (1); *The Eliza Cornish* (2); *Robertson v. Clarke* (3); *Gallagher v. Taylor* (4).

One consequence of such sale is to excuse notice of abandonment not being given, and the loss is deemed an actual total

(1) L. R. 6 P. C. 319.  
 (2) 17 Jur. 738.

(3) 1 Bing. 445.  
 (4) 5 Can. & C. R. 368.



loss because the owner wholly loses the subject matter of the insurance; and by reason of the legal expropriation there is nothing left of the subject matter in the owner to transfer to the underwriters through abandonment. Here the sale was made with the knowledge and in the presence of the owner. It was also made with the knowledge of the underwriters to whom notice of abandonment had been given after the survey and before the sale. The owner having given notice of abandonment, apparently did not wish by any intervention in the sale to affect his notice, and the underwriters apparently did not wish by any intervention to appear to accept the abandonment. Assuming for the purposes of the case, that the sale by the master under such circumstances—his principal being present—would have the same effect as if made by him in the absence of the owner, there is still left something to be found by the jury to justify such sale, viz., the fact of the stringent necessity for the sale. The question left to the jury as to whether the master acted as a prudent person, and in the exercise of a sound discretion, and found by the jury in the affirmative does not meet the point. The question of stringent necessity should be clearly presented, explained, and passed upon. While therefore the act of the master in selling was an act which, as between the owner and the purchaser, could not be impugned, inasmuch as the owner stood by and allowed the sale to go on; it is not shown by the verdict of the jury that, as between the plaintiff and defendants, it is to be treated as a sale made under circumstances of stringent necessity.

Then, as to the finding of the jury that the defendants accepted the abandonment: the only evidence bearing on this is a statement of Mr. O'Leary, that Knowlton, when still agent of the company, and Whittaker, when he became agent, said that they had sent the papers to the company, and had advised that the matter be arranged, or had recommended payment.

Acceptance of abandonment is to be by something distinct and unequivocal: *Thellusson v. Fletcher* (1). Here there is not even an equivocal acceptance, for the agents refrained from exercising any authority they may have had, and referred the

1889.  
O'LEARY  
v.  
THE PELICAN  
INSURANCE  
Co.  
King, J.

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(1) Esp. 73.

1889.  
 O'LEARY  
 v.  
 THE PELICAN  
 INSURANCE  
 Co.  
 King, J.

matter to their principals for their action, accompanied, however, with an expression of their views. This bound nobody. The jury also found that Sullivan consented to the sale. There is no evidence of this, in any proper sense of the word "consent." And besides, there is nothing to show that Sullivan had any authority to bind defendants by any expression of his opinion. On this point, the remarks of Mr. Justice Gwynne, at p. 378 of *Gallagher v. Taylor* (1), are very pertinent.

There being then no waiver of the breach of warranty by an acceptance of abandonment, the defendants would be entitled to a nonsuit, were it not that the existence of some correspondence on the subject of permission to use such waters renders it proper to direct a new trial instead of a nonsuit.

There is, however, another ground for a new trial, in the absence of evidence of a constructive total loss. One condition of the policy stipulates that the insurers are not to be held liable for a constructive total loss in case of abandonment or otherwise, unless the cost of repairing the vessel, under an adjustment as of partial loss according to the terms of the policy, should amount to more than one-half of the vessel's value as declared in the policy; and the declared value was \$2,500. There was no attempt to prove that this condition had been met; and there being, as already shown, no proof of acceptance of abandonment, the verdict as for a constructive total loss cannot be sustained, and on this ground also there should be a new trial.

Then as to recovery as for a partial loss: Such a claim is recoverable upon a declaration claiming a total loss, upon sufficient proof of the amount of the partial loss; but no proof of amount was adduced.

Mr. *Palmer* contended that the plaintiff could not in any event recover as for a constructive total loss, because the vessel was proved to be in existence as a vessel at the time of action brought, citing *Taylor v. Smith* (2); *Providence Washington Insurance Company v. Corbett* (3); *Shepherd v. Henderson* (4); *Dean v. Hornby* (5). In order to defeat what was pre-

(1) 5 Can. R. C. S. 363.  
 (2) 1 Han. 119.

(3) 9 Can. S. C. R. 256.  
 (4) 7 App. Cas. 49.

(5) 3 E. & B. 180.

viously a total loss, it is essential, however, that the assured must at the time of action brought, either have the possession of the vessel or the means of obtaining restoration. Examples of this are, where a vessel after total loss by capture is recaptured; and where (as in *Taylor v. Smith*) the underwriters saved the vessel and offered to restore her to the assured who had given notice of abandonment. The rule is not however applicable where there has been a legal sale of the vessel and she is in existence in the hands of the purchaser or his assigns; for in such case the assured would not have the possession or the means of restoration. That might perhaps have been this case if the sale had been proved, and been found by the jury to have been *bona fide*, and for the benefit of all concerned, and to have been made under circumstances of stringent necessity. I say nothing however as to whether a sale by the master, in the presence of the owner, could under any circumstances be treated as otherwise than a sale by the assured himself.

1889.  
O'LEARY  
v.  
THE PELICAN  
INSURANCE  
Co.  
King, J.

In my opinion there must be a new trial.

PALMER, J. This is an action on a policy of insurance on the barque "C. S. Parnell," tried before Mr. Justice Tuck at the Kent Circuit, in September, 1888, and resulted in a verdict for plaintiff with leave for this Court to enter a nonsuit.

The vessel was proved to be lying a mile or two off the coast of New Brunswick, at the mouth of the river Richibucto, and on the eleventh November, drove on shore on the east coast of Kent, within or near the harbor of Richibucto. It was contended by the defendants that this was a being within the Gulf of Saint Lawrence or Straits of Northumberland, after the thirty-first of October. On the other hand, the plaintiff contends that there was no proof that this was in the Gulf of Saint Lawrence or the Straits of Northumberland; but if we could not take judicial notice of the geography of the place, it would appear to be clear that it is the east coast of Kent, as declared by the Consolidated Statutes, cap. 2, which is there stated to be bounded by the Gulf of Saint Lawrence.

The fact that the vessel drove on that shore would be proof that the waters that so floated her ashore were the waters of

1889.  
O'LEARY  
v.  
THE PELICAN  
INSURANCE  
Co.  
Palmer, J.

the Gulf of Saint Lawrence. But in the case of *Birrell v. Dryer* (1), Lord Blackburn, in addressing the House of Lords, says:—"I think that the Court should take judicial notice of the geographical position and the general names applied to such districts as this; in short, of all that we see on the Admiralty chart of this part of the sea. I do not know whether the first discoverers of America called the Gulf that of St. Lawrence, and then gave the same name to the river, or *vice versa*, nor do I think it material. The name has for many years been applied to both. I think, that applying the name as we find it used in charts and by geographers, to a well defined district, it includes both the river and the gulf."

The plaintiff contends that the proper construction of the clause in the policy is, that the vessel was not prohibited from being in the Gulf of St. Lawrence, but only from loading lime there; but I think that by the proper construction she was prohibited from being there at all. The words are, "from loading lime, from the River and Gulf of Saint Lawrence," &c., "permitted, however, to use Gulf ports in Nova Scotia proper, up to November fifteenth," &c., "from Newfoundland," &c., "from ports in Greenland or Iceland or being engaged in sealing." If the words, "from loading lime" applied to one, it would apply to all these prohibitions. Such a view is entirely inconsistent with the permission to use the gulf ports in Nova Scotia, or being engaged in sealing, unless, forsooth, we could suppose the absurdity that the contract could mean that the shipowner was to be prohibited from loading lime when engaged on a sealing voyage.

All contracts such as policies of insurance must be read in the light of relevant facts, and must have a reasonable construction; and here, if lime is to be prohibited from being loaded in the Gulf of Saint Lawrence, so it must be in the ports of Greenland, or being engaged in sealing. All this would appear to be unreasonable even if another construction of the instrument was not perfectly plain. But when we look at the draft of the contract as it originally stood, and see the words that all these were a matter of entire prohibition, and all that is erased is the prohibition from loading more than the

registered tonnage of the articles named, I can see no reason why any other alterations should be supposed to have been intended when the words are at least equally capable of meaning that the vessel should be prohibited from loading lime, and also from using the ports in the river and Gulf of Saint Lawrence, subject to the exceptions named. I therefore think it is clear that a nonsuit should be entered.

1889.  
O'LEARY  
v.  
THE PELICAN  
INSURANCE  
Co.  
Palmer, J.

The plaintiff has applied for a new trial on the ground of newly discovered evidence; that is, that he has a paper to shew that the defendants agreed that he should have power to use the Gulf of Saint Lawrence after the prohibited time, and the only proof given of this is that the defendants' counsel admitted that there was a letter written to the plaintiff by the defendants' agent with whom he effected the insurance, an extract from which relating to this matter is as follows:—

“We enclose slip giving permission for the barque to use Gulf of Saint Lawrence on present voyage and trust you will find satisfactory. You can remit the premium by cheque, or pay on next visit to St. John.”

He made no admission other than what was contained in the letter and that plaintiff's counsel did not know of it at the trial, stating that the company did not know, and he denied that the company ever got any premium, or that the plaintiff ever assented to the terms of the paper referred to, or became liable to pay for the permission, whatever it was, that was contained in the letter. The plaintiff made no affidavit at all, and we know nothing about it except as above stated. If the plaintiff had shewn the exact terms of the permission, and shewed that he had accepted it and made himself liable to pay for it, or if we could see that by the application that he made to the agent he had so made himself liable by the permission being within the exact terms of the application, and then he had shewn that he did not know of it, or could not get it, at the former trial, I think we ought to grant a new trial if we could see that by the terms of it the plaintiff had made out a case. Of course this would involve the amendment of the declaration on the payment of the costs occasioned both by the amendment and by the new trial. But as this is not the case, I cannot see how the Court can accede to the application,

1889.  


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O'LEARY  
v.  
THE PELICAN  
INSURANCE  
Co.  


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Palmer, J.  


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without violating every principle on which such new trials have ever been granted, and introducing a principle so dangerous, that a trial could never be final. It is so plainly the principle on which new trials of this nature are granted, that it must be shewn the party did not know of the newly discovered evidence at the last trial; and it must also appear clearly that if it had been there it would make out a case in favor of plaintiff. It is impossible for either of these things to appear, without the Court being in possession of the exact terms of the plaintiff's application, and the exact terms of the permission and the consideration, if any, there was to be for it.

There does not appear to be any reason why these matters should be withheld from the Court, nor why it was not shown on the former trial; and, therefore, it appears to me we would not be warranted in granting a new trial on this ground. The authorities are collected in 2 Chit. Arch. (12 ed.) 1516.

I therefore think a nonsuit ought to be entered.

SIR JOHN C. ALLEN, C. J. I think it clear that the defendants are entitled to a nonsuit, unless the question of the discovery of new evidence is sufficient to prevent it.

The case has been very fully discussed by my brothers, Palmer, King and Tuck, who have considered all the important questions on both sides, and therefore it is unnecessary for me to say anything on the merits of the case, and I shall confine my remarks to the point of the discovery of new evidence.

I admit that the facts on this point are weak. There is no affidavit from the plaintiff on the subject, and nothing to shew why he had not the letter at the trial which authorized him to use the Gulf of St. Lawrence after the date mentioned in the policy. He ought to have known that this letter was a very essential part of his case. It is admitted that the letter was in the defendants' possession at the trial, and that the plaintiff's counsel had no knowledge of its existence till then; but it is difficult to suppose that the plaintiff himself had forgotten it.

I do not think it probable that the defendants had volunteered to extend the time for using the Gulf ports. It is much more reasonable to suppose that the letter was written in

answer to an application by the plaintiff for an extension of time. At all events, in case of a new trial, if the plaintiff does not prove either that the extension of time was given on his application, or that he assented to the offer made by the defendants by the letter (if it did originate with them), he would probably fail in his action.

I think, with some hesitation, that a new trial should be granted, the plaintiff paying the costs of the former trial and of the application to set aside the verdict, in thirty days after taxation; and in case they are not so paid, that a nonsuit should be entered.

WETMORE, J. I agree with the learned Chief Justice.

*New trial, upon payment of costs.*

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SAYRE v. WILLIAMS.

1889.

*Practice — Affidavit to hold to bail — Statement of cause of action — Certainty of.*

October 18.

An affidavit to hold to bail should be direct and positive as to the existence of a cause of action.

Therefore, an affidavit to hold the master of a vessel to bail in an action for negligently losing a scow, which stated that the scow had been taken to the vessel with deals for loading, and made fast thereto, and taken charge of by the master, but only alleged the negligence of the master, and consequent loss of the scow, as matter of information and belief, was held insufficient.

Per PALMER, J. That if the affidavit alleged facts that were reasonable evidence of a cause of action, sufficient to satisfy the Judge who ordered the arrest, it was sufficient.

This was an application made to His Honor Mr. Justice King, at Chambers, to set aside the arrest of the defendant Thomas Williams, and for an order to have the bail-bond delivered up to be cancelled, on the ground that the affidavit on which the Judge's order for the defendant's arrest was made was insufficient.

His Honor referred the matter to the Court.

June 12, 1889. *McLean*, in support of the application. The

1889.  
O'LEARY  
v.  
THE PELICAN  
INSURANCE  
Co.  
Allen, C. J.

1889. affidavit to hold to bail is not distinct and positive as to the existence of a cause of action, nor does it state a sufficient cause of action. Many of the allegations are only of the deponent's belief or information. See *Fricke v. Poole* (1); *Nicholson v. Nowlin* (2). It should aver whatever is necessary to shew the plaintiff's right of action: *Townsend v. Burns* (3). An executor may swear to his belief: *Sheldon v. Baker* (4). No contract to return the scow is shewn. At most, there was a non-feasance and not a mis-feasance. It is not alleged that the captain or any of his servants took control of the scow. *Wetmore v. McKenzie* (5). [King, J. referred to *Foulkes v. Metropolitan District Railway Co.* (6)]. The right of a passenger to be carried safely is independent of contract. *Piggott on Torts*, 233. In case of non-feasance there is no liability. *Thorne v. Deas* (7); *Balfe v. West* (8); *Elsee v. Gatward* (9).

*C. A. Palmer*, contra. The test is, had the defendant charge of the scow. If so, his not doing an act, or what might be termed non-feasance, renders him equally responsible as if he had committed a mis-feasance. It is submitted that when the affidavits are read together, they clearly shew a sufficient cause of action to entitle the plaintiff to an order to arrest the defendant. In the case of a Judge's order, it is only necessary that the Judge to whom the application is made, is satisfied, from all the facts brought before him, of the existence of a cause of action. *Damer v. Busby* (10). Even if there is doubt as to the sufficiency of the affidavit, the arrest should not be set aside, as the plaintiff would thereby be deprived of all possible means of recovering his claim.

*McLean*, in reply. In the case of *Stephenson v. Elliott* (11), the arrest was upon a Judge's order, and there the affidavit was held insufficient.

*Cur. adv. vult.*

The following judgments were now delivered :

SIR JOHN C. ALLEN, C. J. The only point which I think

(1) 9 B. & C. 543.

(2) 3 Puga. 210.

(3) 2 C. & J. 468.

(4) 1 T. R. 87.

(5) 1 P. & B. 557.

(6) 5 C. P. D. 157.

(7) 4 Johns. (N. Y.) 84.

(8) 13 C. B. 468.

(9) 5 T. R. 143.

(10) 5 P. R. (Ont.) 358.

(11) 3 Puga. 199.



it necessary to consider in this case is, whether the cause of action on which the plaintiff claims, is stated with sufficient certainty and positiveness in the affidavits on which the Judge's order for the defendant's arrest was made.

It is stated in Chit. Arch. (12th ed.) 752, that the affidavit must be direct and positive as to the existence of the debt or other cause of action, and not merely argumentative. And in *Fricke v. Poole* (1); Lord Tenterden, C. J., said: "An allegation in an affidavit to hold to bail, is conclusive on the defendant; it is not traversable. It ought therefore to be certain. We must not intend anything in such affidavit."

Applying those principles to the present case, let us see what material facts are stated positively.

The plaintiff states: 1. That he was the owner of a scow or lighter, used for the purpose of delivering deals alongside of vessels in the harbor of St. John. 2. That he hired the scow to one Gregory, for the purpose of delivering deals alongside the steamship North Erin. Then it is stated in the third paragraph that the plaintiff was informed and believed that the scow was taken alongside the vessel on the 30th April last, and delivered, with her lading of deals, into the custody and control of the defendant, the master of the steamship North Erin, who received and accepted the scow, and caused it to be fastened and secured alongside the vessel. The fourth paragraph states that the defendant and his servants, the officers and crew of the ship, conducted themselves so negligently, carelessly and improperly in the mooring and securing the scow that it broke adrift in the night of the 30th April, or early in the morning of the 1st May, and was driven or forced out to sea, and has not since been heard of, and has, by such carelessness and grossly negligent conduct of the defendant and his agents, been wholly lost to the deponent.

The affidavit of one Samuel Elliott, states that he delivered the scow, mentioned in the plaintiff's affidavit, alongside the North Erin, and took a line from one of the men of the vessel and made the scow fast to the vessel. That on the end of the scow which was up-stream, there were three good and substantial ring-bolts for fastening lines or hawsers to; that he

1889.

SAYRE  
v.  
WILLIAMS.

Allen, C. J.

1889.

SAYRE  
v.  
WILLIAMS.  
Allen, C. J.

fastened one line to the scow, as was customary in the harbor of St. John, and then left the master of the vessel and his officers and crew to secure the scow as they should deem best, as after fastening the one line, the scow was in their charge, and he had nothing further to do with her till she was unloaded, when he would cause her to be taken away. That at the time of taking the scow to the vessel, the current was running very strong by reason of its being the freshet season; and in his opinion, one rope or hawser to one ring-bolt in the scow, was not a proper or sufficient securing of it. That he called the attention of the master of the steamer to the fact that the scow was not properly secured, and required looking after.

So far, the affidavit of Elliott substantially states facts. He then adds, that he does not personally know how the scow was fastened to the steamship, but according to his information and belief, it remained till one or two o'clock in the morning of the 1st of May, outside of another scow, and fastened to the steamship by one rope only, in one of the ring-bolts of the scow.

These affidavits shew positively enough that the plaintiff was the owner of a scow which he lent for the purpose of carrying deals to the North Erin; that the scow was taken to the vessel and made fast, having been taken charge of by the master or some of the crew; and that the master was told by the person who took the scow there, and who, apparently, had nothing to do with discharging the deals, that it was insufficiently fastened, and required to be looked after. There, all positive statement of facts ends, though something more was essential to shew that the plaintiff had a cause of action for which he could arrest the defendant; namely, the negligence of the master or his servants, and indeed, even the loss of the scow. Of those matters there is not a single fact stated, except on information and belief.

It is true, that the fourth paragraph of the plaintiff's affidavit states absolutely that the scow broke away from the ship and was driven out to sea on the night of the 30th April, or the morning of the 1st May; but this evidently was not, I think, intended as the statement of a fact within the plaintiff's own knowledge, but was founded on his information and belief, as in the preceding paragraph, because it was not relied on at

the argument as a positive statement of the fact within the plaintiff's knowledge. If it could have been so treated, the application to rescind the Judge's order would not have been arguable, nor, probably would the affidavit of Elliott as to his information and belief on the same matter have been produced ; for it certainly could not add any weight to a positive affidavit on the point by the plaintiff.

As the case stands on the affidavits, it is only matter of inference that the scow was lost ; which is not sufficient.

Had those paragraphs of the affidavits which are founded on information and belief been omitted, as I think they should have been, what case would the plaintiff have made out to arrest the defendant ?

Holding the affidavit to hold to bail to be insufficient, does not in any way affect the question whether the plaintiff has a right to maintain the action. He may have a good cause of action against the defendant, and still not have shewn ground by the affidavits to arrest him.

I think the application to set aside the order for the arrest, and to deliver up the bail-bond should be granted, on condition that the defendant enter a common appearance in the suit.

WETMORE, KING and FRASER, JJ., concurred.

PALMER, J. Mr. Justice King made an order to hold the defendant to bail, on the several affidavits of the plaintiff and one Elliott. The plaintiff's affidavit stated in effect as follows : That he was the owner of a scow, which he hired to one Gregory for the purpose of delivering deals alongside the steamship "North Erin" ; that he was informed and believed that the scow was taken alongside the steamer in the harbor of Saint John, and delivered with her lading of deals, to the custody, possession and control of the defendant, the master of the vessel, who received and accepted the control thereof, to be fastened and secured alongside said vessel ; that the master and his servants conducted themselves so carelessly, negligently and improperly in the mooring and securing of the scow, that she broke adrift in the night and was driven, by the tide, out to sea and lost ; that the scow was of the value of \$350 ; that he could not re-

1889.

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SAYRE  
v.  
WILLIAMS.  

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Allen, C. J.  

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1889.

SAYRE  
v.  
WILLIAMS.  
Palmer, J.

place the same during the season ; and that the defendant was grossly negligent in the method in which he fastened the scow ; that the loss to the plaintiff was \$400 ; that the defendant was about to leave the jurisdiction of the Court, and that his arrest was not sought for the purpose of harrassing him, but for the sole purpose of securing indemnity. A Mr. Elliott, in his affidavit stated that he delivered the scow alongside the steamer, and took a line from one of the steamer's men and made the scow fast to the steamer ; that on the end of the scow which was left upstream, there were three ring-bolts for the fastening warps to, and that it was customary always for him, in the harbor of Saint John, to leave the scow fastened with one line and then to leave it to the master of the vessel, his officers and crew to secure the scow as they should deem best ; and that after fastening one line to the head of the scow, she was then in their charge and he had nothing further to do with her until she was unloaded, when he would cause her to be taken away ; that when he had delivered the scow at said vessel it was about one o'clock in the afternoon ; that he was informed and believed that she remained until one or two o'clock next morning ; that there were other scows between where the steamer was anchored in the stream, and the Sand Point shore in Carleton, secured at the upstream end only with the one line or rope to one of the three ring-bolts ; that at that time the current was running very strong at that place, and in his opinion, one rope or warp to one of the ring-bolts in the end of the scow, was not a proper and sufficient securing of the scow ; and that he called the attention of the defendant to the fact that the scow was not then properly secured, and required looking after. That the rent for a scow in the shipping season is one dollar per day, and the time they are most fully used is from the fifth of April to the first of October, in each year.

The defendant's counsel made a motion to set aside the bail bond, on the ground that the affidavits disclosed no sufficient cause of action. It was answered by the plaintiff's counsel : first, that the affidavits were sufficient ; and secondly, that if they were not, the motion should have been to set aside the Judge's order ; and that the bail bond could not be set

aside with the Judge's order standing, as it was the Judges' order alone that authorized the arrest.

The principles which govern the granting of orders for arrest for causes of action for which a party cannot, without such order, be arrested at common law, are very important. It is true, such an order should not be made unless there is reasonable evidence of a cause of action; but an arrest rarely could be made for such a cause, if evidence, such as might be required on the trial, was absolutely necessary to be produced before it could be made; for there is no means of procuring the evidence of the defendant or hostile witnesses, as there would be on the trial, and therefore the Judge might be sufficiently satisfied that there was reasonable evidence of a cause of action without it being so strictly proved as on the trial. The whole object of the bail is to prevent persons from committing wrong or incurring liability to parties within the jurisdiction, and then escaping beyond it without answering for the wrong; and it would very much weaken the energy and power of the Court to prevent or redress such wrongs, if Judges were too technically strict as to the proof of their being committed, before authorizing an arrest to answer. Therefore all, I think, a Judge ought or ever did require, was such reasonable evidence as ought to satisfy his judicial discretion, that a wrong had been committed, for which the law authorized him to order the arrest, and the question is, whether this has been done in this case? On the other hand, I think, no Judge ought to make such an order unless such facts are proved before him, as ought reasonably to satisfy him *prima facie* that a cause of action exists. In this case the plaintiff himself did not know of all the facts necessary to prove his cause of action, nor had he any witness to prove exactly what took place, but he could prove that his scow was put into the hands of the defendant; that it was his duty, by the custom of the port, to secure and take care of her; that when left with the defendant, she was not properly fastened to resist the current for any length of time; and she went adrift by the carelessness of the defendant; but, he could not tell exactly what that carelessness was. It might have been that she was never properly fastened; or it might

1889.

SAYRE

v.

WILLIAMS.

Palmer, J.

1889.

SAYRE

v.

WILLIAMS.

Palmer, J.

have been that she was properly fastened and afterwards the fastening removed.

All these things, it appears to me, are matters of evidence, the onus of which the jury might think ought to be cast on the defendant to explain, or an inference made against him. At all events, if unexplained, the question is whether there would be evidence for a jury? If so, there was sufficient evidence to make the order, and even for a verdict for the plaintiff if this was the evidence on the trial; not that I think, that because the jury on the trial, or the Court on the final hearing of the case, if the case was doubtful in point of law or fact, might decide finally against the plaintiff, that would be any reason for setting aside the arrest on a summary application, for the object of the bail is to answer the plaintiff if he succeeds, whether he will or not cannot be for certain determined until the final end of the case. All that it appears to me that the Court can or ought to do on a summary application, is to see that the plaintiff has put before it, under oath, such evidence as would afford reasonable ground for a *prima facie* case. The state of facts sufficiently proved by the affidavits, discloses a cause of action, if the defendant either owed a duty to the plaintiff to take care of his scow, and did not do so, or did any wrong thereto by which it was lost, and it will aid in discussing the questions to determine this question of law. If A., the owner of a scow, hires her to B., who employs her in carrying deals to a ship, of which C. is master, and she is left in his possession for the purposes of the ship, and is lost by being negligently taken care of, can A. maintain an action against C. for the damage occasioned by her loss? The first consideration is, that if A. cannot, he is without a remedy; for he can have no action against B., for B. is guilty of no wrong. He merely used the scow as he had a right to do, according to the terms of his hiring, and it may be doubtful whether B. could recover against C. for the value of the scow, for he did not own it, and therefore its loss was not damage to him. The ground of the contention is, that as there was only a contract between A. and B., there was no privity between A. and C., and if a contract is necessary between A. and C., in order to maintain an action, it may be doubtful if there is any,

as the only way such a contract could be implied, would be by treating B. as the agent of A., in depositing the scow with C.; and it is argued that as, from the deposit, there would arise an implied contract with B., that C. would take proper care of the scow, this would exclude the idea of any implied contract with A., the owner. Horace Smith, in the second edition of his work on Negligence, at page 6, says: "Sometimes, however, when there has been a breach of contract towards the contracting party, there has also been a breach of duty towards some third person not privy to the contract, and such breach of duty is actionable." Again, he says: "The true question always is, has the defendant committed a breach of duty apart from the contract; if he has only committed a breach of contract, he is liable to those only with whom he has contracted; but if he has committed a breach of duty, he is not protected by setting up the contract, in respect to the same matter, with another person."

1889.

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SAYRE  
v.  
WILLIAMS.  

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Palmer, J.  

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The question is not, whether there is a contract or not, but what is the relation between two persons, A. and C., which imposes the duty (with regard to the property of A. that C. has taken into his possession), of using such ordinary care or skill as may prevent injury to such property.

My mind goes the full length of the principles affirmed by the Master of the Rolls in *Heaven v. Pender* (1); although the other Judges decided that case on other grounds, and did not go so far, and it is not necessary to do so in order to maintain the proposition I have stated. This principle was distinctly affirmed by this Court, and afterwards by the Supreme Court of Canada on appeal, in the case of *Busby v. Winchester* (2). The contract in that case was between the shipper of the goods and the defendant only; there was no contract with Busby, the owner of the goods, the plaintiff in that suit. There, as here, the contention was, that the shipper alone could sue, as there was no privity between the owner of the goods and the captain, but the Court held that the captain owed a duty to the owner of the goods, arising from his having taken possession of them to take care of and to deliver them. In that case, all that the defendants did, in one sense, was a nonfeasance; he

(1) 11 Q. B. D. 503.

(2) 16 Can. S. C. R. 336

1889.

SAYRE  
v.  
WILLIAMS.  
Palmer, J.

did not deliver the goods to the owner when demanded. The principle appears to be that if a person takes possession of another's goods, it is his duty to use reasonable care, if not doing so might cause injury to such property, in reference to which Mr. Smith, at p. 7, says: "The principle enunciated by the Master of the Rolls seems to be, that if a reasonable man must see that if he did not use care in the circumstances, he might cause injury to the person or property of another, it is his duty to exercise such care."

I think it clear that if A. accepts possession of goods belonging to B., he is bound, after he has taken them into his possession, to the same degree of care as a depositary. It is in effect the same as the first kind of bailment mentioned by Lord Holt, in *Coggs v. Bernard* (1). Take a bald case of A. finding B.'s goods. A. would not be bound to take them into his possession, but if he does, he must use them with some degree of care. See *Isaack v. Clark* (2). In the great case of *Foster v. Essex Bank* (3), the Court say, at p. 507: "The depositary is answerable, in case of loss, for gross negligence only, or fraud which will make a bailee of any character answerable." Again, the Court, in that case, say (at p. 508): "Fraud on property deposited, committed by the depositary, or his servant acting under his authority, express or implied, relative to the subject-matter of the fraud, is equivalent to gross negligence, and renders the depositary liable." Shewing that the principal is liable for the gross negligence of his servants with reference to the deposit, when the servant is acting in reference to the matters of his employment. It is not necessary, however, to decide that the master was liable for the act of the sailors, because Elliott's affidavit states that the custom of the port of Saint John was for the scowman to leave the scow fastened with one line, and then leave it to the ship to secure her as they chose, as after that she was considered in their charge; and it is evident that it is the duty of the shipper to put the deals alongside, and of the master to accept them there and to put them on board, and to do this he must accept both, which must remain there until unladen, and he must take care of the scow as well as of the deals.

(1) 2 Ld. Raym. 969.  
(2) 2 Bulst. 306, 312; 1 Roll. 59, 126.

(3) 17 Mass. 479.



This scow is shewn to have been fastened by the ship's line, and the captain notified that she was so there, and required to be made more secure, and common honesty required that if the captain did not desire to take possession of her he should say so, and not allow the persons to leave her there, and go away under the impression that he would take care of her, if he did not so intend.

1889.

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SAYRE  
v.  
WILLIAMS.  

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Palmer, J.  

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How does the case differ from an action by the owner of the deals if they were lost under the same circumstances? Could it be pretended that they were not accepted by the master when all was done to make a delivery according to the custom of the port, and he notified that they were, and the person in charge allowed to leave without any notice that he would not accept them? Leaving out the evidence that the man took charge of them. This is evidence that it was his duty to take charge of it according to the custom of the port, and he did so, according to that custom, but even this is not necessary, for the liability of the master for the act of his sailors or any person in charge of the ship, is fully discussed and affirmed in *Busby v. Winchester*.

I have made these observations, because I have a strong opinion that the defendant in this case is liable, if he or his men in the course of their employment with regard to the general business of the ship, was guilty of any negligence by which the plaintiff's scow was lost as stated in the affidavit; even if such negligence could only be called nonfeasance, that is, not doing something that they ought to have done; but, if this scow was lost by the negligence of the defendant, as the affidavits state, then I think he was guilty of what may be properly called misfeasance. This principle was fully affirmed in the case of *Foulkes v. Metropolitan and District Railway Co.* (1). Mr. Justice Thesiger, at page 170 says: "The solicitor general attempted to draw a line in a case like the present, between the commission of an act, which is in itself wrongful, and the omission of some act to which the company would admittedly be bound, if the passengers were carried by them under a contract. It is, however, very difficult to see how such a line can be reasonably drawn. Suppose the carriage in

1889.  
SAYRE  
v.  
WILLIAMS.  
—  
Palmer, J.  
—

which the plaintiff rode had been allowed by the neglect of the defendants to be in an insecure and dangerous condition, and an accident had thereby occurred to him; why should the defendants be the less liable to him than if their porter had, as the train was leaving Hammersmith station, negligently shut the carriage door upon the plaintiff's fingers, in which case the solicitor general admits the defendants would be liable."

In this case, can a distinction be drawn between the case where the captain has failed sufficiently to fasten the scow, and if he had first properly fastened her and then taken such fastenings off? For the latter he would be unquestionably liable, and why not for the first?

The case of *Wetmore v. McKenzie* (1) has been cited, but that case can be supported as the Court decided that the declaration was upon a contract, that is, that there was an allegation that the defendant, at the special instance and request of the plaintiff, had the care of a certain scow of the plaintiff, and therefore the action failed on that ground, as did the counts of the same character in *Busby v. Winchester*, and, if some of the dicta of Mr. Justice Duff in that case is contrary to the principles I have endeavored to state, I think they are clearly inconsistent with what was decided in *Busby v. Winchester*, and to that extent are over-ruled. At all events, in any view of this case, I cannot see how the Court should be called upon to decide so important a question on a mere summary application. If, on the final adjudication of the case, it turns out that there is no cause of action, the bail are not injured. All we have now to see is that there is reasonable evidence of a cause of action, and if so, the defendant ought to be held to answer it.

As my brothers think the affidavits not sufficient, it is no use my looking over them to see if they come up to what I have indicated is necessary.

TUCK, J., being related to the plaintiff, took no part.

*Application granted without costs.*

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(1) 1 P. & R. 557.

*Ex parte* GRIEVES.

1890.

April 26.

*Canada Temperance Act—Justice of the Peace—Disqualification by relationship—Bias—By whom informations laid—Third offence—Presence of defendant at trial—Amendment of Act after first conviction—Keeping for sale—Evidence.*

Where the interest of a Justice of the Peace in a summary prosecution tried before him is not pecuniary, it must, in order to disqualify him, be such a substantial interest as to make it likely that he had a real bias. Mere relationship to the prosecutor is not sufficient.

A number of persons, including one N., were associated together to aid in enforcing the Canada Temperance Act. N., being furnished with money by a member of the association, purchased intoxicating liquor, in order to enable him to lay informations and prove the illegal sale. The information was in fact laid by a policeman, at the request of members of the association, who furnished funds to carry on the prosecution. The conviction of the defendant was made on the evidence of N., who was a cousin of the Justice.

*Held*—(WERMORE, J., dissenting)—That his relationship to N. did not disqualify the Justice from trying the information.

It is not necessary that prosecutions for violation of the Act should be brought by or in the name of the Collector of Inland Revenue of the district where the offence is committed.

A defendant who is not present at the trial, but is represented by an attorney, may be convicted of a third offence: following *Ex parte Groves*, 23 N. B. Rep. 38.

Evidence of a sale of intoxicating liquor will sustain a conviction for keeping liquor for sale.

A conviction under sec. 99 of the Canada Temperance Act for illegally keeping intoxicating liquor for sale, is not affected by the repeal by 51 Vic., cap. 34, sec. 5 of the 4th sub-sec. of sec. 99, which relates to sales for medicinal or manufacturing purposes.

In Easter Term, 1889, on motion of *J. A. Van Wart*, a rule *nisi* for a *certiorari* was granted to remove a conviction of one William B. Grievés, had before the Police Magistrate of the City of Fredericton, for a third offence of keeping intoxicating liquor for sale contrary to the provisions of The Canada Temperance Act. The grounds on which the rule was granted were:

1. That the Police Magistrate was disqualified from trying the complaint—one Wesley Nichol, a witness for the prosecution, being the real prosecutor, and a cousin of the Police Magistrate.

2. That the prosecution should have been in the name of the Collector of Inland Revenue.

3. That the second part of The Canada Temperance Act had

1890.

*Ex parte*  
GRIEVES.

been amended by the Act 51 Vic., cap. 34, passed in 1888, and therefore that any convictions made before the Act was amended would not be evidence to prove previous offences.

4. That sec. 111 only applied to municipalities.

5. That the defendant could not be convicted for a third offence unless he was present in the Court at the time.

April 10, 1890. *George F. Gregory* (*McCready* with him) shewed cause. Even if the witness Nichol had been the informant and prosecutor, the relationship existing between him and the Magistrate would not have disqualified the Magistrate from trying the complaint. Relationship between the Judge and a party to the cause is only a matter of bias, and not one of absolute disqualification, differing in this respect from a case of interest. In a case of bias, the appellate Court must decide each case by itself. There is no fixed rule governing such cases. Where even the smallest pecuniary interest is shewn, it is a ground of disqualification. Here, Nichol was only a witness, though a zealous one. As to the principles on which the Courts act in determining whether a case is one of bias or not, see *Reg. v. Rand* (1); *Reg. v. Meyer* (2); *Reg. v. Handsley* (3); *Reg. v. Farrant* (4); *Reg. v. Grimmer* (5); *Reg. v. Milledge* (6); *Reg. v. Lee* (7); *Reg. v. The Justices of Huntingdon* (8).

2. Sec. 101 of the Act cannot be construed into providing that a person may lay an information in the name of another person; if so, certainly not without the latter's authority. The name of the Collector of Inland Revenue could not be used without his consent and authority. If he authorized the use of his name, he would become the real prosecutor, and upon him would fall the burden of the costs. While the section provides that the prosecution may be brought in the name of the Collector of Inland Revenue, it as clearly states that it may be brought by or in the name of any other person.

3. As to the effect of the amendments of the Act, the previous convictions which were relied upon were not based upon the sections of the Act which had been repealed or amended,

(1) L. R. 1 Q. B. 230.

(2) 1 Q. B. D. 173.

(3) 8 Q. B. D. 383.

(4) 20 Q. B. D. 53.

(5) 25 N. B. Rep. 424.

(6) 4 Q. B. D. 332.

(7) 9 Q. B. D. 394.

(8) 4 Q. B. D. 522.

and would not therefore be in any way affected by the amending Acts. The certificate of the Magistrate is made evidence of the previous conviction, and the onus would be upon the defendant to show that these convictions were for acts which were not offences under the Statute as it now stands. Besides, the question as to whether there were previous first and second offences, is a question of evidence, and cannot under *Ex parte Daley* (1) be raised on *certiorari*.

4. The case of *Ex parte Daley* also disposes of the fourth objection. But it is submitted that evidence of liquor having been sold, is evidence of the keeping of liquor for sale.

5. The case of *Ex parte Groves* (2) decides that a defendant may, in his absence, be convicted of a second offence. A conviction for a third offence may, on the same principle, be made if the defendant's attorney is present and denies the previous conviction.

*J. A. VanWart*, in support of the rule. As to the first and second objections: It is submitted that the proper construction of sec. 101 of the Act is, that the information must be laid by or in the name of the Collector of Inland Revenue. If not so limited, the last clause of the section would enable a person to bring the prosecution in the name of any other person. In that way the real prosecutor may not be the one in whose name the information is laid. In the present case Nichol is shewn to be the real prosecutor, although Wright is named as the informant, and Nichol is related to the Magistrate. *Ex parte Jones* (1). In either case this conviction is bad, for the prosecution was not brought by the Collector of Inland Revenue; and being brought by Nichol in the name of Wright, Nichol being related, this is a fatal objection. 3. This was a conviction for a third offence. The two previous convictions relied on were made before Acts 51 Vic. cap. 34, and 51 Vic. cap. 35, were passed amending The Canada Temperance Act. Sub-sec. 4 of sec. 99 of the Act is repealed by 51 Vic. cap. 34. So far as the evidence shews, the two previous convictions may have been made for violation of sub-sec. 4 so repealed, and if so they cannot now be relied upon in order to establish

1890.

*Ex parte*  
GRIEVES.

(1) 27 N. B. Rep. 129.

(2) 28 N. B. Rep. 38.

(3) 27 N. B. Rep. 552.

1890. a third offence. The same may be said as to other amendments. Under the rule of construction of statutes given in *Ex parte GRIEVES*. The Interpretation Act (Rev. Stat. Can., cap. 1), sec. 7 sub-sec. 51, the references to first, second and third convictions, must be held to relate to the Act as amended; sec. 115 must therefore have reference to the Act as amended. It has not been shewn for what the previous convictions were made, and it is possible that they were for offences which only existed before the amending Act. Form O, of the amending Act of 1888, shews that proceedings for repeal of the Act, must be taken under the Act as amended. 4. Sec. 111, which was relied on under the evidence as establishing the offence of keeping for sale, only relates to proof where the offence is committed in a "Municipality." The offence was alleged to have been committed in the City of Fredericton. While the city is a municipal corporation, it is not a Municipality, within the general meaning of the word. 5. The penalty for a third offence being imprisonment, the defendant should have been personally present when the minute of adjudication was made. *Reg. v. Salter* (1); *Reg. v. Harris* (2). In *Ex parte Groves* (3) the Court did not go further than to hold that if the defendant appeared by his attorney, in the case of a second conviction, that was sufficient.

*Cur. adv. vult.*

The following judgments were now delivered :

SIR JOHN C. ALLEN, C. J. Grievés was convicted before the Police Magistrate of Fredericton in April last, for a third offence of keeping spirituous liquor for sale contrary to the second part of The Canada Temperance Act.

A rule *nisi* to quash the conviction was granted on the following grounds :—

1. That the Police Magistrate was disqualified from trying the complaint—one Wesley Nichol, a witness for the prosecution, being the real prosecutor, and a cousin of the Police Magistrate.

2. That the prosecution should have been in the name of the Collector of Inland Revenue.

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(1) 20 N. S. Rep. 206.

(2) 1 Ld. Raym. 267.

(3) 23 N. B. Rep. 33.

3. That the second part of the Canada Temperance Act had been amended by the Act 51 Vic., cap. 34, passed in 1888, and therefore that any convictions made before the Act was amended would not be evidence to prove previous offences.

4. That sec. 111 only applies to Municipalities.

5. That the defendant could not be convicted for a third offence unless he was present in the Court at the time.

The question of the Police Magistrate's qualification to try the case is the most important one.

The information was laid by one of the Policemen of Fredericton, at the request of William McFarlane and one William T. Reid, one or both of them. Reid informed the policeman at the time that counsel would be employed to conduct the prosecutions, and that he (Reid) would provide funds for the purpose; and counsel did attend and conducted the prosecution. It appeared that a number of persons, calling themselves "The Star Council of the Royal Templars of Temperance," were associated together for the purpose of enforcing The Canada Temperance Act in Fredericton; that McFarlane and Reid, and one Wesley Nichol and others were members of the Council; and that after the informations in this and several other cases were laid, a committee of the Council was appointed to raise funds to carry on the prosecutions. Nichol was not one of the committee, but Reid furnished him with money to buy spirituous liquor in houses where it was supposed to be sold, in order that he might prove the sales. He accordingly purchased liquor in the defendant's house, and in several other places. It did not appear that Nichol was present at the meeting when the committee was appointed. He had intended to lay informations against the defendant and several other persons for illegal sales, but after consultation with Reid it was considered better that the informations should be laid by a policeman.

The first question to be determined on this branch of the case is, whether Nichol was substantially one of the prosecutors in this case. As a member of the Star Council, I would say that probably he was, though, as he does not appear to have been one of the committee appointed to carry on the prosecutions, he may not have contributed anything to the fund, which it may fairly be presumed was raised for the

1890.

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*Ex parte*  
GRIEVES.

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Allen, C. J.  

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1890.

Ex parte  
GRIEVES.Allen, C. J.

purpose. At all events, there is nothing to shew that he could be made in any way liable for the costs, in case the Police Magistrate had dismissed the information.

The mere fact of Nichol being a cousin of the Magistrate would be no ground of his disqualification to try the informations.

Questions of disqualification of Justices to try complaints on the ground of interest or bias, are not uncommon in England.

In the case of *Reg. v. Rand* (1), it was laid down that though any pecuniary interest, however small, in the matter, disqualifies a Justice from acting in a judicial inquiry, the mere possibility of bias in favor of one of the parties does not *ipso facto* avoid the Justice's decision: in order to have that effect, the bias must be shewn to be at least real. And Blackburn, J., said: "Wherever there is a real likelihood that the Judge would, from kindred, or any other cause, have a bias in favor of one of the parties, it would be very wrong in him to act; and we are not to be understood to say that where there is a real bias of this sort, this Court would not interfere; but in the present case there is no ground for doubting that the Justice acted perfectly *bona fide*; and the only question is, whether in strict law under such circumstances, the certificate of such Justices is void, as it would be if they had a pecuniary interest; and we think that *Reg. v. Dean of Rochester* (2) is an authority that circumstances from which a suspicion of favor may arise, do not produce the same effect as a pecuniary interest."

It is unnecessary to go through the cases cited in the argument on this point. They establish the principle that where the interest of a Justice in a matter in which he has taken part is not pecuniary, it must be a substantial interest, so as to make it likely that he had a real bias; that the mere possibility of bias is not enough to disqualify him.

Applying these principles to the present case, I am unable to see that the relationship existing between Nichol and the Magistrate was sufficient to bias him in his judgment, or was likely to prejudice the defendant in the decision of the matter;

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(1) L. R. 1 Q. B. 230.

(2) 17 Q. B. 1.



at most, I think it was only a possibility of bias, which is not enough to disqualify him. If it had appeared that Nichol could have been made liable for costs in case the prosecution failed, perhaps the conclusion might have been otherwise.

The case of *Reg. v. Simmons* (1) is distinguishable; for there the Justice who tried the case was a member of the Division of the Sons of Temperance by whom the prosecution was carried on; he was actually one of the prosecutors. It resembles the case of *Reg. v. Lee* (2).

I think there is nothing in the second objection. The 101st section of The Canada Temperance Act declares that prosecutions under the second part of the Act may be brought by or in the name of the Collector of Inland Revenue in whose official division the offence was committed, "or, by or in the name of any person." A similar objection was taken, but not decided, in *Reg. v. Dibblee* (3). The right to lay an information is clearly not confined to the Collectors of Inland Revenue.

I cannot find anything in the Act 51 Vic., cap. 34, amending The Canada Temperance Act, to support the third objection. The conviction was under section 99 of The Canada Temperance Act, which prohibits the keeping for sale or selling intoxicating liquor; and sub-sec. 4 excepts from the operation of the section, sales of intoxicating liquor for medicinal purposes, or for use in some art, trade or manufacture, made by licensed druggists or vendors.

This sub-section was repealed by the 51 Vic., cap. 34, sec. 5, which substitutes provisions respecting the sales of liquor for medicinal purposes, and for use in trade or manufactures, differing from those in the repealed sub-section 4; but I cannot see how this amendment, or the provisions of the 11th section, 51 Vic., cap. 35, affects the present case, where the conviction is for keeping spirituous liquor for sale. If the defendant was authorized to sell under sub-section 4, that was matter of defence.

Another objection to the conviction was, that as the second part of The Canada Temperance Act had been amended, any convictions made before the amendment could not be used to prove previous offences committed by the defendant, that any

1890.

*Ex parte*  
GRIEVES.

Allen, C. J.

(1) 1 Puga. 158.

(2) 9 Q. B. D. 394.

(3) 23 N. B. Rep. 30.

1890.

*Ex parte*  
GRIEVES.

Allen, C. J.

offences since the passing of the amending Acts (1888) could not be connected with offences committed before the amendment, so as to establish a second or third conviction, but that the counting must commence *de novo* after the passing of the amending Act; consequently the present conviction should only have been for a first offence.

The 51st sub-sec. of sec. 7 of the Interpretation Act was referred to by the defendant's counsel in support of his views. It enacts as follows: "Whenever any Act or part of an Act is repealed, and other provisions are substituted by way of amendment, revision or consolidation, any reference in any unrepealed Act, or in any rule, order or regulation made thereunder to such repealed Act or enactment, shall, as regards any subsequent transaction, matter or thing, be held and construed to be a reference to the provisions of the substituted Act or enactment relating to the same subject matter as such repealed Act or enactment."

This section seems to me somewhat obscure. At all events, I do not see that it affects any of the questions in this case.

The conviction for a third offence was under sec. 115 of the Canada Temperance Act, sub. sec. (f), which declares as follows: "If any person who has been convicted of a violation of any provision of the second part of this Act, is afterwards convicted of an offence against such provision or against any other provision of the second part, such conviction shall be deemed a conviction for a second offence, within the meaning of section 100 of this Act, and may be dealt with and punished accordingly, although the two convictions may be for acts of different descriptions; and if any such person is afterwards again convicted of a violation of any provision of the second part, whether similar or not to the previous offences, such conviction shall, in like manner, be deemed a conviction for a third offence, within the meaning of section 100 of this Act, and may be dealt with accordingly."

This section is not altered in any way by the 51 Vic. cap. 34. It is therefore immaterial whether the previous offences were of a similar character with the offence charged in the present case; provided they are all offences against the second part of the Act.

Another objection was taken, that the defendant could not be convicted of illegally keeping liquor for sale, merely by evidence of the existence of a bar, counter, kegs, and other appliances usually found in taverns, because the 111th section of the Act only applied to municipalities where the Act was in force, and not to cities.

Admitting that this may be the proper construction of the section, I do not think the objection is a valid one in this case, because here the prosecution proved not only the existence of a bar, counter, bottles, glasses, etc., but the actual sale of intoxicating liquor in the house occupied by the defendant. The section makes the existence of the appliances *prima facie* evidence that liquor is kept there for illegal sale, and puts on the defendant the burthen of disproving that it is so kept. But where evidence of the fact of sale is proved by the prosecution, the presumption which would be raised by proof of the facts stated in the 111th section need not be, and, in fact, is not relied upon. Selling, or keeping intoxicating liquors for sale, is an offence under the 99th section of the Act; and evidence of an actual sale is certainly sufficient to sustain a conviction for keeping for sale.

The remaining objection is disposed of by the case of *Ex parte Groves* (1), in which a majority of the Court held that where a defendant appeared by attorney, he could be convicted of a second offence under the Act, (and the same rule would apply to a third offence) though he was not personally present to answer the question whether he had been so previously convicted. In this case, the defendant's attorney was asked the question, and denied the previous conviction. I think none of the objections to the conviction are sustained, and that the rule should be discharged.

KING, J., concurred.

TUCK, J. I think the order *nisi* for *certiorari* in this case, ought to be discharged.

Whether Wright was or was not the real prosecutor, is not material, in my view of this case. He laid the information;

1890.

*Ex parte*  
GRIEVES.

Allen, C. J.

1890.

Ex parte  
GRIEVES.Tuck, J.

and it is said that the prosecution was, in fact, conducted by a body of people at Fredericton, known as the Star Council, of which Nichol, who gave evidence, was a member. It appears that Nichol's grandfather and the father of the Police Magistrate, who made the convictions, were brothers. The contention is, that because of this relationship, Mr. Marsh, the Police Magistrate, was disqualified from acting, and that this conviction made by him, is therefore bad. Now, admitting that Nichol was the real informer and prosecutor, besides being a witness, this would not necessarily disqualify the Magistrate. Relationship, differing from pecuniary interest, is not of itself a disqualification. It may produce a bias in the mind of the Justice; and it is for the Court to consider, whether the relationship here produced such a bias as to influence, unduly, the magistrate's judgment. Each case must depend upon and be decided according to its own circumstances. I think there are no circumstances in the present case to warrant the conclusion of undue influence. The relationship is not close, and if Nichol was the real prosecutor, and the prosecution failed, he would only be liable for costs. But at most, he was only a member of a council, which had undertaken to conduct prosecutions, a fact, which may or may not have been present to the mind of the magistrate, when he made the conviction. Even if it was, I think upon the facts disclosed by the affidavit and upon the evidence, this Court has no right to say that this relationship, caused in the mind of the justice, a bias, which influenced his decision.

In my opinion, then, the Magistrate had jurisdiction, and there was evidence to warrant the conviction. *Ex parte Daley* is an authority.

- There is another point made in support of this order *nisi*, namely: That convictions made before the passing of Acts in amendment of cap. 106, cannot be used to secure a conviction for a subsequent offence. The amending Acts are: 51st Vic., caps. 34 and 35. I think there is nothing in this contention. Certificates were put in evidence of convictions for previous offences. The argument is that these convictions may have been for offences which are not offences under the amending Acts. But, even if this was so, the defendant should have

shewn affirmatively that the charge was not for a third offence. See sec. 115, sub. sec. *f.*, cap. 106, Rev. Stat., and also the Interpretation Act cap. 1, sec. 7, sub. sec. 51.

In my opinion, the defendant has failed to make good his contention, and the conviction must be affirmed.

1890.

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*Ex parte*  
GRIEVES.

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Tuck, J.  

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WETMORE, J. Upon the evidence, the Police Magistrate found the defendant guilty of the subsequent offence, as first charged in the information. The offence so charged was keeping for sale, between the 1st day of December, 1888, and the 20th of January, 1889. It also charged two previous convictions of the defendant, as for first and second offences of unlawfully selling liquor contrary to the Act.

On the defendant being so found guilty, his counsel, Mr. VanWart, was then asked if the defendant, John B. Grieves, was previously convicted, as alleged in the information. Mr. VanWart, as counsel for the defendant, replied that the defendant had not been so convicted. Mr. Gregory, as counsel for the prosecution, produced and offered in evidence the certificate of the Police Magistrate, as proof of the previous convictions, which was received in evidence, subject to Mr. VanWart's objections.

On the application for a rule *nisi*, it was shewn that Wesley Nichol, who it was contended was really and substantially the informant, was related to John L. Marsh, the convicting Magistrate — John L. Marsh, the father of the Police Magistrate, being a brother of the father of Jane Nichol, the mother of Wesley Nichol. This relationship is not disputed.

Nichol, in his evidence, says: "I was examined in the case against Frederick B. Coleman, and made the following statement: 'William T. L. Reid furnished me with the money. He gave me the money the same day, on the street, near the post office. He said to me: 'You know we have been talking the matter considerably in the Royal Templars Council. It is about time something was done to stop rum selling.' He wanted to know if I could not do something to bring about the conviction of those persons who were selling. He said he would do his part as a Royal Templar; that the whole body was in sympathy with the movement, and wanted me to take

1890.

*Ex parte*  
GRIEVES.

Wetmore, J.

some active steps. I told him I would do what I could. I also said it was understood that I was to furnish evidence that would convict any person selling rum. The only places mentioned were the Barker House, Queen Hotel, and any person or persons who were selling to me. He gave me one dollar, and I bought from a person at the Barker House, and from a person at the Queen Hotel, and from a person at the Waverley House. He gave me another dollar on the 4th January last. I told him whom I had bought from." The witness kept the bottles, and had a memorandum on each bottle which he produced. He made the purchases for the purpose of getting evidence against them to prosecute on each occasion. He went to buy, if he could, for the purpose of laying information against them. He mentioned it to Mr. Reid and Rev. Mr. McLeod. Mr. Reid only counselled him to buy. He did not ask the advice of any person about doing it. He bought the liquor for the purpose of laying informations, and for no other purpose. It was his intention before he bought, at the time and afterwards, to lay the information himself against the defendant. He told Mr. Reid, Mr. McLeod and Mr. Gaunce about buying it. On a previous examination of the witness, he said he told Mr. Gaunce he bought the liquor for the purpose of laying the information. There was something said between Mr. Reid and witness about who should lay the information. The understanding between them was that it was proper for the policeman to lay the information. Mr. Reid and witness had some talk about the informations the day they were laid. The conversation, or remarks made, referred to the six informations that were laid, including Grievés. The witness further says: "I am a member of the Royal Templars of Temperance. I first abandoned the intention of laying the informations in my own name just immediately before they were made. Reid is a member of the Star Council. Reid furnished the money to purchase the liquor."

On re-examination, he said he thought Zebedee Wright was a member of the Star Council. Witness—I did not request him to lay the information. He did abandon the idea of personally laying the informations just before they were laid. It was understood that the policemen were the proper persons to

lay the information. This understanding was arrived at between Mr. Reid and witness, and the understanding embraced witness appearing as a witness. Witness did not communicate to the policeman the facts he could prove. He did not know how Policeman Wright came to lay the informations. Reid told witness that Wright would lay the informations before he did lay them—the same day they were laid. Witness knew he was to be a witness. Reid told him about the witnesses generally. He knew Reid had the intention of seeing one of the policemen about laying the informations, and when he did so told me that Wright had consented to lay the informations. Witness assented to it and consented to appear as a witness only.

It is quite clear to me that the witness, Wesley Nichol, a most material witness for the prosecution, was solicited by Mr. Reid, to procure the necessary evidence to insure conviction of the defendant Grieves and other persons, mentioned in a conversation between Reid and Nichol. Mr. Reid and Nichol were both members of the Royal Templars of Temperance. Mr. Reid, a member of the Star Council, furnished money with which Nichol was to make purchases of intoxicating liquors from the several persons mentioned, with the express intention of Nichol laying informations against such of them as he succeeded in making purchases from. It was understood Nichol was to furnish evidence. Nichol says he made the purchases for the purpose of getting evidence against them to prosecute. He bought the liquor for the purpose of laying informations and for no other purpose; it was his intention before he bought, at the time and afterwards, to lay the informations himself, against the defendants. On a previous examination, as a witness, he said he told Mr. Gaunce he bought the liquors for the purpose of laying the informations. There was something said between Mr. Reid and witness about who should lay the information. The understanding was that it was proper for the policeman to lay the information. Mr. Reid and witness had some talk about the informations the day they were laid and before they were laid. The conversation or remarks made, referred to the six informations that were laid, including Grieves. Witness first abandoned the

1890.

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*Ex parte*  
GRIEVES.

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Wetmore, J.  

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*Ex parte*  
GRIEVES.

Wetmore, J.

intention of laying the informations in his own name, just immediately before they were made. Reid furnished the money to purchase the liquor.

Nichol, on re-examination says he did not request Wright to lay the informations. He did abandon the idea of personally laying the informations, just before they were laid. It was understood (not saying by whom it was understood, probably between Reid and witness, but whether any one else, or whom or how many were admitted to this understanding, does not appear, nor does it appear for what reason or why such understanding was arrived at), that the policemen were the proper persons to lay the information. This understanding was arrived at between Reid and witness. The understanding embraced Nichol appearing as a witness; he did not communicate to the policeman the facts he could prove. He did not know how policeman Wright came to lay the informations. Reid told him Wright would lay the informations before he did lay them, the same day they were laid. He knew Reid had the intention of seeing one of the policemen about laying the informations, and Reid told him Wright had consented to lay the informations. Witness assented to it, and consented to appear as a witness only. No doubt Nichol under decided cases was competent to have laid the information; why he did not do so as he had intended to do, until just before the informations were laid, is left pretty much to conjecture. It is evident Nichol was the person intended should lay the informations, until just before informations were laid.

It may, among other reasons, be conjectured as a reason for Nichol not laying the informations that he was so related to the Police Magistrate that the Magistrate would not undertake the investigation. In the event of the prosecution failing the informant would, in the discretion of the justice, be liable for costs. See sec. 59, Summary Convictions Act. Can it be supposed there was not some impression, if not positive understanding, that Wright should be indemnified from any liability for costs. It does not appear who liquidated the expenses. It might not be considered a very unreasonable conclusion that the Royal Templars were to see all parties clear of any pecuniary responsibility. Of this body both Mr. Reid and witness



were members. So if Mr. Nichol was the informant, and related to the Police Magistrate, it would not be desirable, to say the least, that he should preside at the investigation. But he was not in fact the actual informant. The policeman was put forward for the purpose. If his being substituted for Nichol does away with the effect of relationship if such exists between the Police Magistrate as would have prevented his presiding had Nichol been informant, then there is an end of the matter. Is it a severe or wrong stretch of one's imagination to suppose the Police Magistrate knew about these informations before they were laid, and who it was intended was to be the informant before the substitution of Wright at the last moment? With all the talk there has always been about these informations against the keepers of the higher class of hotel keepers, it is idle to suppose the Police Magistrate had not some inkling of what was going on, and quite likely a pretty thorough and accurate information.

In *Reg. v. Simmons* (1) in the judgment of the Court it is said: "It being undisputed here, that Justice Simmons was a member of the Division of the Sons of Temperance, by which the prosecution against McGowan was carried on, he was virtually one of the complainants, and was clearly incompetent to take any part in the proceedings, and consequently the conviction is bad. It is a principle of jurisprudence that no one should act as a Judge upon an inquiry in which he is interested. It is important to the pure administration of justice, that the acts and motives of judges should be above the reach of suspicion. Not only should persons interested in a decision abstain from taking part in it, but they should also avoid giving any ground for the belief that they influence others in arriving at a decision." Now was not Nichol virtually interested in these proceedings; he made the purchases and virtually aided in the committing of the offence; he was to have been the informant up to the last moment. Can it be supposed he was not imbued with a firm determination to carry out his not very laudable purpose of convicting his fellow man of an offence, in the commission of which he was largely a participant, if not actually an abettor. A not very creditable instance of his zeal, is the

1890.

*Ex parte*  
GRIEVES.

Wetmore, J.

(1) 1 Puga. 168.

1890.

*Ex parte*  
GRIEVES.

Wetmore, J.

endeavor to purchase liquor from a little girl, aged 12 or 13, a mere child, at Alexander Howard's, for the purpose of instituting a prosecution against Howard. Was he not a person interested, and can he, at the last moment it may be, in order to have the investigation before the Police Magistrate, substitute or consent to the substitution of another informant in order to evade the effect of any relationship existing between himself and the Magistrate, which, if he were the informant, would prevent the Magistrate acting? It seems to me the avoiding of the slightest tarnish or shade upon the impartial administration of justice forbids it. Avoiding any ground for the belief that there was any reasonable ground of suspicion in the matter calls for the astute interference of this Court to prevent such. Under all circumstances I have arrived at the conclusion that the substitution of Wright, as he was substituted, should not be allowed to alter the position of the Magistrate, so far as he would be affected by Nichol being the actual informant by reason of the alleged relationship. Making a catspaw of the policeman at the last moment should not, I think, be allowed to make any difference.

I cannot disabuse my mind of the impression, and a pretty strong one, that these parties—the Royal Templars of Temperance and the Star Council, and Nichol among them—must have given the policeman pretty clearly to understand that he would be fully indemnified against all costs and expenses. There is nothing shewn to the contrary and evidence points in that direction. The affidavit of Wright used on shewing cause does not disabuse my impression. He says he laid the information in his capacity as policeman at the request of Mr. T. L. Reid, and it was understood between Mr. Reid and him at the time of laying the said informations that the said prosecutions should be conducted by counsel, and that he would provide the means necessary for the payment of said counsel; and the said prosecutions were conducted by counsel, retained, as he believed, by the said Reid, pursuant to the said understanding, and with his Wright's consent and approbation. I do not understand the meaning of this consent and approbation of Mr. Wright, except that Mr. Wright may have been a member of the Royal Templars of Temperance, or perhaps of the Star Council, and he

consented to their funds being so appropriated. I do not suppose Mr. Reid was going to pay out of his own private funds; that he intended paying out of the funds of the Royal Templars is much more likely, and if so Nichol would be interested as a member. The relationship appeared in the evidence, and the objection was taken at the investigation, and there was a time when opportunity was afforded to shew that these parties, Nichol among them, had not indemnified the policeman. I think the Magistrate should then have stayed his hand. If he knew of it before commencing proceedings, he should have abstained from entering upon the investigation. I think, in justice to the Magistrate, he should have been informed of Nichol's action in securing the commission of the offence and of the relationship, which may not have occurred to him before the trial. This might have avoided all difficulty. Then about the relationship, is it such as should debar the Police Magistrate from acting? The present case appears quite within that of *Ex parte Jones* (1). See also *Ex parte Wallace* (2). These cases seem to establish that such a relationship as appears in the present case would prevent the right of the Magistrate to hear the case.

It would be absurd attempting to shut from one's mind, the very acrimonious feeling that unquestionably exists respecting the Canada Temperance Act and its administration. Who is there that escapes from censure, even severe attack? I think I may venture to say abuse, respecting it. The Judges of the land do not even escape, and that from sources where a moderate amount of charitable construction might fairly be put upon their acts.

Under all the circumstances, my mind is impressed that the substitution of Wright as informant, did not remove the effect of Nichol's relationship to the Magistrate, and that the *certiorari* should be allowed, however the matter might fare on application to quash the conviction on return of the proceedings and further argument thereon.

PALMER and FRASER, JJ., took no part.

*Rule discharged.\**

(1) 27 N. B. Rep. 552.

(2) 27 N. B. Rep. 174.

\* The like judgment was given in the following cases: *Ex parte Coleman*; *Ex parte Edwards*; *Ex parte Crangle*; and *Ex parte Smiler*.

1890.

*Ex parte*  
GRIEVES.

Wetmore, J.

1889. **HARRISON v. THE NORTHERN & WESTERN RAILWAY  
COMPANY.**  
*November 2.*

*Practice—Equity Appeal—Service of Notice of Appeal.*

The Court has no jurisdiction to extend the time for appealing from a decree in Equity, unless notice of appeal has been served on the Judge who made the decree, within the time directed by the Consol. Stat., cap. 49, sec. 61.\*

October 12, 1889. *D. L. Hanington, Q. C.*, on behalf of the plaintiff, obtained a rule calling upon the defendants to shew cause why leave should not be granted to enter this cause on the Equity appeal paper, and for time to print the case on appeal.

It appeared by the affidavits read on obtaining the rule, and on shewing cause, that the minutes of the decree were settled on the 8th August, then last past, and that notice of appeal was served on the defendants' solicitor, on the 28th August, and on His Honor Mr. Justice Fraser, who made the decree, on the 31st August. A dispute having then arisen between the plaintiff and his solicitor, nothing further was done.

Consol. Stat. cap. 49, sec. 61, and Rule of Hilary Term, 1889, were referred to.

October 17, 1889. *Geo. F. Gregory* shewed cause. The requirements of sec. 61 of cap. 49, Consol. Stat., have not been complied with, and the Court has no jurisdiction to grant this application. No notice of appeal was served upon the Judge who made the decree, within twenty days after the settling of the minutes. In *Robertson v. Armstrong* (1), a notice of appeal was served in proper time, but the Court decided that they had no jurisdiction to hear the appeal, inasmuch as the notice did not state the grounds of the appeal. In the present case no notice of appeal was served upon the Judge within the time required by the statute.

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\* See 53 Vic., cap. 4, sec. 105.

(1) 28 N. B. Rep. 102.

*D. L. Hanington, Q. C.*, in support of the rule. It appears by the affidavits that the plaintiff intended to appeal, and believed that a notice of appeal had been served. He should not be prejudiced by the act of his solicitor, who, as an officer of the Court, stands between the plaintiff and the Court, so that the plaintiff himself cannot act. The defendants have not shewn that they would be injured by allowing the appeal. If no notice at all had been given, the plaintiff would have been in a worse position, but a proper notice was served upon the defendants' solicitor. That is a substantial compliance with the statute. The service upon the Judge is directory only.

1889.

HARRISON  
v.  
NORTHERN &  
WESTERN  
RAILWAY CO.

*Cur. adv. vult.*

The following judgments were now delivered :

TUCK, J. I think this application should be refused.

By section 61 of cap. 49, Consol. Stat., it is enacted that "Every appeal from any decree or order shall be made within twenty days after the settling of the minutes of such decree or order, and shall be by notice, as in case of new trial, to be served on the opposite party as well as on the Judge who made the decree or order."

Here a notice was not served on the Judge who made the decree or order, until the twenty days mentioned in the Act had expired. Without such service, I think this Court has no jurisdiction to grant further time, to have the cause entered and the case printed. Before a party can be in a position to ask for further time as to an appeal, he must have served a notice on the Judge, in the manner required by the statute.

KING, J. I think the case of *Robertson v. Armstrong* (1) requires us to hold that the appeal cannot be allowed in this case. It is there decided that compliance with the requirements of Consol. Stat., cap. 49, sec. 61, is a condition precedent to the jurisdiction of this Court to hear the appeal.

This is a stronger case than *Robertson v. Armstrong*, because what was omitted there was a statement of the grounds of

(1) 23 N. B. Rep. 102.

1889.  
HARRISON  
v.  
NORTHERN &  
WESTERN  
RAILWAY CO.  
King, J.

appeal, here there is a failure to serve any notice upon the Judge within the time limited by the statute.

If the non-compliance were occasioned by the act of the other party, or by the act of the Court, other principles might allow of the appeal being had, but such considerations do not arise here. There is no explanation of the circumstances under which the omission to serve notice took place, and therefore, I think that we are bound by authority to refuse this application.

PALMER, J. This is an application to extend the time for printing the case on appeal from the decision of Mr. Justice Fraser. As there has been no injury to the other side, and the application can be granted without delaying the hearing of the case, it is clear it ought to be granted if we have power to do so; but it appears that the notice of appeal, under sec. 61 of cap. 49, Consol. Stat., was not served on the Judge until more than twenty days after the settling of the minutes, and as this is statutory jurisdiction, I am clearly of the opinion that this Court has no jurisdiction, the order, therefore, asked for, would be of no validity. However, if the plaintiff had no other redress, I would be inclined to make the order, and then dismiss the appeal, so as to give the plaintiff a right to appeal, and then test whether the opinion I have expressed was correct or not; but the plaintiff's counsel did not appear to wish this course, and the plaintiff is not without redress, for he can apply to the Supreme Court of Canada, or a Judge thereof, for leave to appeal directly to that Court from Mr. Justice Fraser's decision complained of, therefore I think the application should be refused.

WETMORE, J. This is an application for leave to enter an appeal, the time prescribed by sec. 61 of cap. 49, having expired.

The section is: "Every appeal from any decree or order shall be made within twenty days after the settling of the minutes of such decree or order, and shall be by notice, as in case of new trial; to be served on the opposite party as well as on the Judge who made the decree or order." In this case

the order was not served on the Judge until after the expiration of the twenty days. Under sec. 7 of The Controverted Elections Act (Consol. Stat. cap. 5), "The petitioner shall, after the expiration of the time limited for service of the petition, and within fourteen days thereafter, file in the office of the clerk of the pleas the duplicate petition, with affidavit of service, and order of Judge when necessary, in the same manner as in cases of service of writ or summons." In *Rogers v. Turner* (1), the papers were not filed within the fourteen days prescribed by the Act, and application was subsequently made to the Court for leave to file the papers. The circumstances of the case were such that if the Court could under the wording of the Act have complied with the application, it would readily have done so, but as the Act required the papers to be filed within fourteen days, the Court felt bound to say they had no power to allow any filing of the papers after the fourteen days. In the light of that case, I think this application must be refused.

1889.

HARRISON  
v.  
NORTHERN &  
WESTERN  
RAILWAY Co.  
Wetmore, J.

I see no reason why the defendants, who applied to dissolve the injunction order, should not be allowed their costs. In my opinion the rule *nisi* should be discharged, and these defendants should get their costs.

SIR JOHN C. ALLEN, C. J., and FRASER, J., took no part.

The Court having taken further time to consider as to costs; in the following term, the Chief Justice stated that the Court were of opinion that the application should be refused with costs.

*Application refused with costs.*

1889.

October 18.

## LANDRY v. BANK OF NOVA SCOTIA.

*Bill of Exchange delivered to Bank by plaintiff to discount—Plaintiff indebted to Bank—Right of Bank to appropriate proceeds in payment of indebtedness—Conversion.*

Plaintiff drew and indorsed a bill of exchange and delivered it to the defendants to discount, which they agreed to do if the bill was accepted. After acceptance, the defendants refused to give the plaintiff either the proceeds or the bill, claiming the right to apply it to the payment of a debt which the plaintiff owed them :

*Held*, that the defendants were liable in trover for a conversion of the bill.

A discount means an advance of money, upon the transfer of a negotiable instrument to the Bank, payable at a future day, as security.

This was an action of trover for a bill of exchange for \$813, drawn by the plaintiff upon and accepted by The Logan Tanning Company, and delivered to the defendants to discount; tried before His Honor the Chief Justice at the Kent Circuit in March 1889. Verdict for the plaintiff.

October 4, 5, 1889. *D. L. Hanington, Q. C.*, moved for a new trial. The evidence fails to shew that the defendants were guilty of a conversion. They never converted to their own use the bill of exchange, but only refused to pay over the proceeds. The putting of the proceeds to the plaintiff's credit, is a discounting of the bill, and is what the defendants agreed to do. Where there is only a question of paying over money, the action must be in assumpsit, not in tort. *Atkinson v. Elliott* (1); *Lechmere v. Hawkins* (2); *Eland v. Karr* (3); *Taylor v. Okey* (4). It is also submitted that the defendants had a banker's lien upon the bill for the plaintiff's indebtedness. [FRASER, J. Not where there was a special contract to discount it, and pay over the proceeds.]

*Geo. F. Gregory, contra.* It is not open to the defendants to argue that trover will not lie, because that has been settled by the judgment of this Court on the demurrer (5). Even if this

(1) 7 T. R. 378.  
(2) 2 Esp. 636.  
(3) 1 East 375.

(4) 13 Ves. 180.  
(5) 23 N. B. Rep. 491.



action were brought in contract, the defendants would have no right of set-off because there would be a special contract and unliquidated damages. The bill would remain in the plaintiff until the defendants discounted it, which they never did. It is said that they discounted the bill, and appropriated the proceeds to the payment of the plaintiff's indebtedness. That is not a discounting of the bill. There must be a purchasing of the bill by the defendants before the property in the bill passes out of the plaintiff. The defendants cannot now set up a lien as a defence. It must be pleaded specially. *Rosc. N. P. Evid.* (15 ed.) 895. *Barnett v. Brandao* (1) shews that the banker's lien could not attach here.

1889.

LANDRY  
v.  
BANK OF  
NOVA SCOTIA.

*Hanington, Q. C.*, in reply.

*Cur. adv. vult.*

The following judgment was now delivered :

PALMER, J. This is an action of trover for a Bill of Exchange drawn by plaintiff in favor of himself, who wrote his name across the back of it, took it to the defendants and offered it for discount to the manager, who told him that he would discount it when it was accepted. The plaintiff then delivered it to him and authorized him to send it to the Pictou Branch of the Bank to be accepted, which was done. When accepted, the bank sold the bill to the acceptor and received the money; and as the plaintiff was indebted to the bank, it claimed the right to set off the proceeds and refused to give the plaintiff either the money or the bill, and the whole question is: whether the property in this bill ever passed to the bank? Whether it did or did not must depend upon what the plaintiff authorized the bank to do; for the property could not pass without the plaintiff's consent.

The plaintiff did consent that the bank should discount it, and never consented to anything else, so that the whole case resolves itself into what is the meaning of discounting a bill.

I do not think a better definition of the word "discount" can be given than that given by Mr. Justice Story, in delivering the opinion of the Supreme Court of the United States, in

1889. the case of *Fleckner v. Bank of the United States* (1). That  
LANDRY learned Judge says: "What is it to discount? Has it not a  
v. right to take an evidence of the debt, which arises from the loan?  
BANK OF If it is to discount, must there not be some chose in action or  
NOVA SCOTIA. written evidence of a debt payable at a future time, which is to be  
Palmer, J. the subject of the discount? Nothing can be clearer than that by  
the language of the commercial world, and the settled practice  
of banks, a discount by a bank means, *ex vi termini*, a  
deduction or drawback made upon its advances or loans of  
money, upon negotiable paper, or other evidences of debt, pay-  
able at a future day, which are transferred to the bank."

Thus shewing that a discount means a loan of money, and a transfer of a negotiable instrument to the Bank payable at a future day as security. And this is all this bank was authorized to do, or the plaintiff ever contemplated. What he meant was, that the Bank should loan him the face of the bill, less the discount, in money, and as security for it he would transfer to them the bill. The bank never did loan the money, and therefore never acceded to the plaintiff's terms, on which alone he consented that the property in the bill should pass to the bank. It, therefore, never did pass, and the property remains in the plaintiff, and he is entitled to recover upon the Bank converting it to their own use.

SIR JOHN C. ALLEN, C. J., WETMORE, KING, FRASER and TUCK, JJ., concurred.

*New trial refused.*

## TURNER AND WIFE V. SMITH.

1888.

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April 28.

*Trespass to land—Entry to take property wrongfully detained by plaintiff—Pleading.*

A plea in trespass justifying an entry upon land to retake logs of the defendant, alleged that the same were wrongfully detained by the plaintiff, and that the defendant entered and took them away, doing no unnecessary damage:

*Held*, on demurrer, that the plea was good.

DECLARATION: Charles S. Turner and Annie E., his wife, by &c., their attorney, sue Albert Smith, for that the defendant broke and entered certain land of the said plaintiff, Annie E. Turner, situate, etc., and described as follows: (*Description of land*); and cut down and carried away the trees then growing and being thereon, and converted the same to his own use.

And also for that the defendant on divers days and times, seized and took the goods of the plaintiff, Annie E. Turner, that is to say, one thousand spruce trees, one thousand pine trees and one thousand other trees, and carried away the same and disposed of them to his own use.

And the plaintiffs claim \$2,000.

PLEA: And for a fifth plea the defendant says that at the time of the alleged trespasses, one Trueman Smith was possessed as of his own property of the said logs, goods and chattels which were on the said close in said declaration mentioned, and wrongfully detained thereon by the plaintiffs; and thereupon the said defendant, as the servant and agent, and by the command and license of the said Trueman Smith, at the time when, &c., entered into and upon the said close, and took and removed the said logs, goods and chattels therefrom, as he lawfully might, doing no unnecessary damage to the said close, which are the supposed trespasses complained of.

To this plea, the plaintiffs demurred on the ground that the plea did not shew how the logs, goods and chattels came upon the said close, or that they came there by the act of the plaintiffs or either of them. Also that the plea was no answer to the first count of the said declaration, and was inapplicable thereto.

1888. February 21, 1888. *W. B. Chandler* supports demurrer to plea. The question is much the same as in *Read v. Smith* (1). A party cannot justify an entry upon the land of another to retake goods, unless he shows how they got there. Here, no ground is shewn for breaking plaintiff's close. *Anthony v. Haney* (2). In *Read v. Smith*, the question of inevitable necessity came in, which is not the case here. [Fraser J. This plea shews these goods were wrongfully detained. See *Hamilton v. Calder* (3).] The allegation of wrongful detention is not sufficient. The facts relied on to shew the detention must be stated. In *Hamilton v. Calder*, the plea alleged a request by plaintiff to defendant to allow him to remove the goods. There must be a specific allegation of the circumstances under which the goods got on the land. The plea is also bad inasmuch as while it professes to answer the whole declaration, it only answers the *asportavit* count. It does not justify the entry.

*D. L. Hanington, Q. C., contra.* The case of *Hamilton v. Calder* is an answer to the plaintiffs' contention. In principle that case is entirely the same as this. It is not necessary to allege a demand. *Blades v. Higgs* (4). The plea stating that plaintiffs detained the goods there wrongfully, is equivalent to saying that they placed or ratified the placing of them there. The request does not carry it any further. See, also, *Graham v. Green* (5).

*Chandler, in reply.* The plea in *Blades v. Higgs* does allege a wrongful detention, but it also alleges a request and refusal to deliver.

*Cur. adv. vult.*

The following judgments were now delivered:

PALMER, J. The question in this case is whether a person whose goods are wrongfully detained by another on his land has a right to enter and take them away, doing no unnecessary

(1) Bert. R. 173.  
(2) 8 Bing. 186.  
(3) 23 N. B. Rep. 373.

(4) 11 H. L. Cas. 621.  
(5) 5 All. 290.

damage. We decided in *Hamilton v. Calder* (1) that he had, in accordance with the principles laid down in *Blades v. Higgs* (2). And the other question in the case is whether the bare allegation that the plaintiff did so wrongfully detain them on the *locus in quo* is sufficient in a plea. I think it is. To show that anything is wrongful, it may not be good pleading merely to allege that it was wrong, for that is a question of law; but the facts which make it unlawful ought to be alleged—that is, facts sufficient ought to be set out to show *prima facie* that a legal wrong has been done, and I think this is sufficiently done in this case, for without the word “wrongful” the allegation would be that the plaintiff was detaining the defendant’s goods on his premises. This would be *prima facie* an illegal act and a wrong to the defendant, and if the plaintiff had any right so to detain them I think the rule of pleading would require that he should set out the facts which would show such right in answer. It follows that in my opinion the plea is good, and the demurrer should be overruled.

1888.

TURNER  
v.  
SMITH.

Palmer, J.

FRASER, J. I think the plea is a perfectly good one. It states that the goods of the defendant being wrongfully detained, he entered the property of the plaintiff for the purpose of taking away his goods, doing no unnecessary damage. It was contended before us that all the facts which would show a wrongful detention should be set forth. If the goods are there, although the plaintiff may know nothing about their being there, if there was a demand and a refusal that would constitute a wrongful detention of the goods, and the party could enter upon the land for the purpose of taking them away. I therefore think that the allegation of wrongful detention is sufficient, but I am hardly prepared to go to the extent that the word “detention” without “wrongful” would be sufficient.

SIR JOHN C. ALLEN, C. J., KING and TUCK, JJ., also thought that the plea was good.

*Judgment for defendant on demurrer.*

(1) 23 N. B. Rep. 373.

(2) 10 C. B. N. S. 713.

1888.

## INCH v. FLEWELLING.

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October 27.*Practice—Amendment of notice of motion for new trial—Adding new ground.*

Amendment of a notice of motion for a new trial allowed on payment of costs, by adding, as a ground, the discovery of new evidence.

Per TUCK, J., that the applicant was entitled to amend without costs, as a matter of right.

October 10, 1888. *Blair, A. G.*, moved upon affidavits for leave to amend the notice of motion for a new trial in this case, by adding as a ground of the intended motion, the discovery of new evidence since the giving of the notice. The case was entered in the docket of Easter Term, 1888, but had not been reached for argument.

A rule *nisi* was granted returnable the second Saturday of term, when

*L. A. Currey* shewed cause. By rule 3 of Michaelmas Term, 1834 (Earle's Rules, 50) the notice must state the grounds of the intended motion. And sec. 10 of Act 42 Vic. cap. 8, provides that the party intending to move must deliver to the opposite party a statement of the grounds of the motion and the authorities relied upon. In the latter part of the section, provision is made for citing additional authorities, with leave of the Court; but there is no provision for adding new grounds. The question of the right to amend a notice has been considered by this Court. In *Woodman v. Town of Moncton* (1) it was held that the Court has no power to extend the time for giving the notice; and in *Mullin v. Frost* (2) the Court refused to allow an amendment. [Allen, C. J., referred to *Griffiths v. Town of Portland* (3)]. Even if the Court has the power to make the amendment, the granting of the leave is discretionary, and the circumstances stated in the affidavits on which the motion is made, do not show a sufficient reason to warrant the Court in granting it. The new evidence relied upon should be fully set out.

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(1) 4 P. & B. 12.

(2) 4 P. &amp; B. 112.

(3) 23 N. B. Rep. 559.

*Blair, A. G.*, in support of the rule. The cases referred to are distinguishable from the present one. In *Woodman v. Town of Moncton*, there had been an omission on the part of the plaintiff's attorney, owing to a misapprehension of the law, and the indulgence of the Court was asked. *Mullin v. Frost* was the case of a mistake, and the application was for leave to give a new notice, and for a different motion. The present application is for leave to add a ground which did not exist, to the knowledge of the moving party, at the time the notice was given. The discovery of new evidence such as to satisfy the Court that if the party had had it at the trial, he must have had a verdict, is always considered a sufficient ground for a new trial. The fact that the notice was given before the new evidence was discovered, does not deprive the party of the benefit of his motion. If the Court can exercise its discretion, this is a case in which it should be done. Besides, it is submitted that under sec. 161 of cap. 37 Consol. Stat., the Court is bound to allow the amendment, as it has not been shown that any injustice to the opposite party will be the result. This is a proceeding in a cause, within the meaning of that section. The case cannot be reached during the present term, and the plaintiff will suffer no delay by the amendment.

1888.  
INCH  
v.  
FLEWELLING.

*Cur. adv. vult.*

On a later day in Term, the Chief Justice stated that the majority of the Court were of opinion that the leave to amend the notice should be granted upon payment of the costs of the application.

TUCK, J., stated that he thought the applicant was entitled, under the circumstances of this case, to amend as a matter of right, and that the terms of paying costs should not be imposed.

*Application granted  
upon payment of costs.*

1890.

## BYRAM v. JOHNSTON.

*April 18.*

*Justice's Court — Suit on promissory note — Judgment by confession — Merger of claim on note — Subsequent arrest of maker — False imprisonment and malicious arrest — Probable cause — Direction of Judge to jury to find certain facts only — Entry of verdict upon the finding.*

In a suit before a Justice of the Peace, the defendant may confess judgment in writing, and the Justice may sign judgment thereon against the defendant, though neither party appears on the return of the summons. Per ALLEN, C. J., WETMORE, PALMER and TUCK, JJ., KING, J., dissenting.

Per ALLEN, C. J., that the defendant by giving the confession had waived his right to object to the Justice's jurisdiction on the ground that it did not appear that either the plaintiff or defendant resided in the same parish as the Justice, as directed by Consol. Stat., cap. 60, sec. 6, and 42 Vic., cap. 13.

Per KING, J., that the judgment signed by the Justice was a nullity because neither party had appeared before him at the return of the summons; and per KING and TUCK, JJ., that the Justice had no jurisdiction under Consol. Stat., cap. 60, sec. 6, on the question of non-residence.

Per ALLEN, C. J., and PALMER, J., that the Courts of Justices of the Peace, not being Courts of Record, the original debt was not extinguished by the judgment signed on the confession, and that the creditor could sue again upon the original debt.

The creditor having afterwards arrested the debtor for the same debt, *Held*, in an action for false imprisonment and malicious prosecution — 1. That an action for false imprisonment would not lie, the *capias* on which the arrest was made being good in form, and issued by a Court having jurisdiction over the subject matter.

2. That an action for malicious prosecution would not lie, either because the judgment on the confession was a nullity, or that the original debt was not merged in such judgment.

3. That the defendant had reasonable and probable cause for arresting the plaintiff — the debt being due, and the jury having found that the defendant was not actuated by malice in arresting the plaintiff.

Where, in such an action, the jury answered certain questions left to them by the Judge, the effect of which was to negative malice in the defendant, the Judge may then direct the verdict to be entered for the defendant, though the jury, in answering the questions, stated at first that they found for the plaintiff.

*Wright v. Parlee* (3 Pugs. 381), considered.

This was an action for malicious arrest and false imprisonment; tried before His Honor Mr. Justice King at the Carleton Circuit in December, 1888.

On the 6th day of October, 1887, the plaintiff, who resided in the County of Madawaska, being at Fredericton, was arrested for a balance due upon two promissory notes, upon a



**capias** issued by the Police Magistrate, at the suit of the defendant Johnston. At the trial the magistrate entered a judgment in favor of Johnston, which was afterwards reversed on review, by an order of Mr. Justice Fraser. From the evidence given before Mr. Marsh, the Police Magistrate, it appeared that in 1884 these same notes had been sent by Johnston to George N. Clark, his agent in the Town of Woodstock for collection. Clark sent them to Burgoyne, of Madawaska, who placed them in the hands of a Mr. LaBelle, a Justice of the Peace of that County, for the purpose of being sued. This Justice brought a suit upon each note in the name of G. M. Cossitt & Brothers, the payees, against Byram, and entered two judgments thereon against him. On the day of trial before Justice LaBelle, neither party appeared, and the magistrate entered up the judgment, because he thought himself authorized to do so, from a postal card received from Byram, the defendant in the suits, stating that he acknowledged judgment in the Cossett matter as he had no inclination to add more costs. The proceedings had before Mr. Marsh, including this evidence, having been laid before Judge Fraser, on review, he reversed the magistrate's judgment, and ordered judgment to be entered for Byram.

1890.  
BYRAM  
v.  
JOHNSTON.

At the trial of this action the learned Judge left the following questions to the jury: "Did or did not Mr. Johnston authorize the bringing of the actions before Mr. LaBelle; or, if he did not do so, did he afterwards know of their being brought, and adopt them by paying the expenses of them." 2. "Was or was not Mr. Johnston actuated by malice in causing the arrest of Mr. Byram." To the first, the jury answered that: "He adopted them by paying the expenses;" and they answered the second in the negative."

Upon receiving these answers the learned Judge directed a verdict to be entered for the defendant.

June 13, 1889. *Geo. W. Allen* argued in support of a motion for a new trial, and

*J. A. Van Wart*, contra.

The arguments of the counsel and the cases cited are fully

1890. referred to in the judgments. [KING, J., referred to *Park Gate Iron Co. v. Coates* (1)].  
BYRAM  
v.  
JOHNSTON. *Cur. adv. vult.*

The following judgments were now delivered :

TUCK, J., after stating the facts as given above, continued : On the motion for a new trial, the principal point urged was misdirection. Before dealing with this, I propose to consider shortly some of the grounds put forth by the defendant's counsel, why the verdict should stand, notwithstanding the charge of the learned Judge.

His principal contention is, that the judgment recovered before the magistrate, LaBelle, in Madawaska, is a nullity, upon which no action could be taken. He argues, that the magistrate had no power to sign a judgment against the defendant in the absence of the plaintiff; that where a summons has been issued by a magistrate at the instance of a party, the magistrate is simply acting as a judicial officer, and has no right to sign a judgment in favor of the party in his absence. It is admitted that neither Cossitt & Brothers, nor their agent, appeared before LaBelle, and the defendant did not appear. He sent a postal card, as it is said, authorizing a judgment. Reference is made to Consol. Stat., cap. 60, sec. 34, which enacts that "the plaintiff may elect to become nonsuit, or if he fail to appear a nonsuit shall be entered; and in all cases tried before a justice the successful party shall recover costs." It is said that because of this section it was the magistrate's duty to enter a nonsuit. This is true in ordinary cases where the plaintiff fails to appear, especially if the defendant is present. It is clear that this section was passed for the protection of a defendant. That when a party summoned to appear before a Justice of the Peace, attends in obedience to the summons, and the plaintiff fails to appear and prosecute, the law wisely provides that he shall have to commence afresh, first however paying the costs of a nonsuit. A nonsuit must also be entered, if both parties are absent at the time of trial, and the defendant has remained silent. But may he not waive the right or protection,

to which he is entitled by the statute? It seems to me, that he would have an absolute right on the day of trial to go to Court and say to the magistrate, in the absence of the plaintiff, the claim you have against me is just, and you may enter judgment against me for the amount. I think that a judgment entered on such instruction would be a good one, and could be enforced against the defendant's person or property. Section 34 is not contrary to this view, for that section does not contemplate any assent to a judgment for plaintiff on the part of defendant. But suppose that instead of going to Court, the defendant, after being sued, writes to the Justice, with instructions to enter up a judgment against him for the amount claimed. Surely he would have a right to do this, and if the magistrate acted upon the directions, entered up a judgment, and afterwards issued an execution, whereby the defendant's goods were seized, no cause of action would arise. In such a case the defendant would have waived his right to say that a judgment had been improperly entered in the absence of the plaintiff, and would be estopped from setting up a claim for the wrongful seizure of his goods. No question of jurisdiction arises here. It is merely a matter of procedure, and if Byram chose to waive a provision which was for his own benefit, he had a right to do so. See *Graham v. Ingleby* (1) and *Park Gate Iron Co. v. Coates* (2). The decision in *Wright v. Parlee* (3) does not conflict with this view. There the Court was dealing with sec. 36, cap. 137, 1 Rev. Stat., which is similar to sec. 34, cap. 60. In the course of his judgment Allen, C. J., says: "If neither party appears at the return of the summons, we think the suit is at an end; at all events, the Justice has no right in such a case to constitute himself the agent of the plaintiff, and sign a judgment against the defendant by default." But that is clearly distinguishable from the present case; for here we have the written consent of Byram that the judgment shall be entered, which important element is absent in *Wright v. Parlee*.

It is argued again that this judgment is a nullity, because there is no evidence, and it does not appear on the face of the proceedings that Byram and the magistrate lived in the

1890.

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 BYRAM  
 v.  
 JOHNSTON.  


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 Tuck, J.  


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(1) 1 Exch. 651.

(2) L. R. 5 C. P. 624.

(3) 3 Fuga. 381.

1890.  
BYRAM  
v.  
JOHNSTON.  
Tuck, J.

same parish, and *Corbet v. McCracken* (1) is cited in support of this view. The majority of the Court appear to have gone to the verge of the law in deciding that case. Both plaintiff and defendant in that case were content to try the issue out upon its merits, and the question of jurisdiction was not raised at the trial. And yet the Court say, that "it should appear on the face of the proceedings, either by evidence, or by the admission of the parties, that the case was within the limits of the commissioner's jurisdiction."

I should have thought, were it not for that case, that where both parties appear and try a cause out upon its merits, and raise no question as to the jurisdiction of the Court, there being no evidence to the contrary, although they were not able to waive, they would be held to have admitted the jurisdiction. But *Corbet v. McCracken*, as regards this Court, seems to be conclusive on the question, and I am bound by it. Applying that decision to this case, there being no evidence, and it not appearing on the face of the proceedings, that Byram and the Magistrate lived in the same parish, he had no jurisdiction to hold a Court for the trial of the cause, and his judgment is therefore a nullity. But it may be said that sec. 6, cap. 60, Consol. Stat., does not apply, since 42 Vic., cap. 13, was passed. The last named chapter contains but one section, which provides that upon the trial of any cause, it shall not be necessary to prove that the plaintiff or defendant, or some one of the plaintiffs or defendants, resides in the town or parish in which any such Court (mentioned in the Act) is situate, or in which such Justice of the Peace resides, unless the objection on that ground is made upon the trial. In the case before the Magistrate, Mr. LaBelle, there was no trial, and therefore no opportunity to make an objection upon the ground of want of residence. He held his Court and entered up a judgment against Byram, upon the authority of a postal card received from him, dated the third day of August, 1884, on which he says: "I acknowledge judgment in the Cossitt matter, as I have no inclination to add more costs." Now, it being still the law that a magistrate has no jurisdiction to give judgment in a cause where the defendant does not reside within the parish

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(1) 2 P. & B. 157.

where the Court is situate, and it being unnecessary to prove that the defendant resides in the parish where the Court is situate only upon the trial of a cause, cap. 13 of 42 Vic. does not apply to *Cossitt v. Byram*, because, in that case, there was no trial. If this reasoning is correct, and the judgment entered by LaBelle is a nullity, it follows, I think, that there was reasonable and probable cause for instituting the proceedings before the Police Magistrate of Fredericton, and if so, there was no malice. The defendant, Johnston, when he made the affidavit which led to the arrest of Byram, must be taken to have had an honest belief that he had a legal right to arrest him, and that the judgment entered up by the Justice LaBelle, even if Johnston knew of it, was no bar to a subsequent action for the recovery of the same notes. If the facts show there was reasonable and probable cause for bringing the action before the Police Magistrate, or do not show a want of it, there being no express malice, there is no evidence of legal malice to leave to the jury.

It is further claimed that this suit was commenced before the proceedings in the action before Mr. Marsh had been terminated. I think the authorities are clear, that the suit in which the arrest was made must be determined, where the proceeding is capable of a final determination, before an action can be brought for malicious arrest. Judge Fraser's order reversing Mr. Marsh's judgment was served on him on the 22nd March, 1888, and the suit was not commenced until the 28th March. I incline to the opinion that when Mr. Justice Fraser made his order reversing the judgment, the proceedings had terminated in favor of the present plaintiff, and that he was not obliged to wait until the Magistrate had made an entry on his book of the reversing order before commencing his suit.

The first ground of misdirection in the learned Judge's charge to the jury is where he says: "If you think, however, that Mr. Johnston did not authorize or adopt the first action, then he would of course have the right to arrest Byram; it was open to arrest upon the second action; and as to his affidavit, the legal title to the notes was transferred to Mr. Johnston by the indorsements, and it was quite competent for him to make the affidavit, and to institute the suit, supposing

1890.

BYRAM

v.  
JOHNSTON.

Tuck, J.

1890.

BYRAM  
v.  
JOHNSTON.  
Tuck, J.  
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the first suit had not been authorized by him in any way." With my view of the judgments obtained before LaBelle, it makes no difference whether or not this part of the charge influenced the jury's answer to the second question, for in my opinion, there was no evidence of malice to leave to the jury. If, however, the learned Judge was right under all the circumstances, in leaving the question of malice, then the charge in this respect may be objectionable, although I do not very well see how it affected the jury's answer to the second question, because in answer to the first they say that the defendant adopted the actions before Mr. LaBelle, by paying the expenses. The Judge's charge is based upon the jury finding that Johnston did not authorize or adopt the first action, but they found that he did. How then could this have influenced their answer "No malice." Looking at the answers, I think, this part of the charge is wholly immaterial.

Then it is said that the learned Judge was wrong in not stating to the jury what malice meant, and explaining to them more fully the different kinds of malice. This objection is without force, because at the close of his charge, the learned Judge defines malice, and also tells the jury that malice need not be expressly proved; that it may be found as a matter of inference. I do not know what more he could have done, unless he wrote a treatise on the subject. From the Judge's charge any intelligent jury must have understood what malice meant.

There is a further contention, that the learned Judge was wrong in telling the jury not to find for either party; to just answer the questions which he would submit to them in writing, and then he would announce his conclusion. I think the Judge had a perfect right to take this course. It has been pursued in English Courts, and again and again in the Courts of this Province. Besides, at the conclusion of the motion for a nonsuit, the learned Judge said that he would leave certain questions to the jury and get their opinion, and what he then would do would depend somewhat upon the consents the counsel were willing to enter into. A nonsuit was refused, apparently with the understanding and consent of counsel, that the Judge should direct a verdict, according as certain

questions were answered, and I think his direction as to the verdict was right.

In my opinion a new trial must be refused.

1890.

BYRAM  
v.  
JOHNSTON.

Tuck, J.  
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KING, J. I am of opinion that the judgment rendered by Justice LaBelle, in the case of *Cossett v. Byram*, was a nullity. Neither Cossett nor Byram, nor any one on the behalf of either, appeared on the return of the summons; and in *Wright v. Parlee* (1), it was held that a Justice of the Peace has no power to sign a judgment in a case where he has issued a summons unless the plaintiff, or some person on his behalf, appears at the return of the summons. By Consol. Stat., cap. 60, sec. 34, it is provided that if the plaintiff fails to appear, a nonsuit shall be entered. It was held in *Wright v. Parlee* that under 1 Rev. Stat., cap. 137, sec. 36, the Justice has no right of his own motion to enter a nonsuit. Whether a similar construction would be placed upon sec. 34 of cap. 60 of the Consol. Stat., I do not know; but it is not important in this case, because the judgment signed was a judgment for the plaintiff, and the Court say that, at all events, the Justice has no right in such a case, *i. e.*, where neither party appears at the return of the summons, to constitute himself the agent of the plaintiff and sign a judgment against the defendant by default. I agree entirely with that. Any other course is opposed to principle and propriety. Nor does it make any difference that in this case Byram had, prior to the return of the summons, sent to the Justice a post card stating that he "acknowledged judgment in the Cossett matter as he had no inclination to add more costs." This might have been available as evidence, if the plaintiff had appeared to prosecute his suit; but, in his absence, and in the absence of any one representing him, the magistrate had no more right to act as the plaintiff's agent and sign judgment than if the defendant had not written to him at all.

The judgment was furthermore a nullity for want of proof of the facts of residence necessary to give jurisdiction—*Corbet v. McCracken* (2)—the case being an undefended one and therefore not covered by the provisions of the Act 42 Vic., cap. 13.

The judgment in *Cossett v. Byram* being then a nullity,

(1) 3 Puga. 381.

(2) 2 F. & B. 157.

1890.  
BYRAM  
v.  
JOHNSTON.  
King, J.

there was nothing in it to affect in any way Johnston's right to proceed against Byram, upon the note which was the subject of suit in the action of *Cossett v. Byram*. There is nothing, therefore, upon which to ground this action by Byram against Johnston for malicious arrest. There was not, upon the part of Johnston, a want of reasonable and probable cause. Besides, the jury have negatived malice. What constitutes malice was explained to the jury in the language of Bayley, J., in *Bromage v. Prosser* (1), viz: "A wrongful act done intentionally, without just cause or excuse;" and the difference between express and implied malice was pointed out, and the jury were told that they might infer malice from the want of reasonable and probable cause. They, however, found that there was no malice; and their finding is abundantly supported by the evidence.

It is objected that the jury should have been directed to find a verdict for defendant, upon their answers to questions submitted to them. It is true that the jury at the time of answering the questions, stated that they found for the plaintiff; but upon it appearing that such a verdict was inconsistent with their finding as to the absence of malice, they were directed that upon this finding their verdict should be for the defendant, and the jury then consented to find, and did find, a verdict for defendant, and this was recorded as their verdict, with their concurrence. The verdict as it stands, is therefore the voice of the jury. As to the suggestion (not made, however, by the counsel for plaintiff), that the plaintiff might perhaps have been entitled to a verdict for false imprisonment—the law is that where an arrest is made through process of a Court having jurisdiction (as here), the plaintiff or prosecutor is liable only if he maliciously and without reasonable and probable cause puts the law in motion. It is otherwise where he interferes in the execution of the process. But that is not this case.

I therefore think that the rule should be refused.

PALMER, J. This is an action for false imprisonment and malicious arrest. It is clear that the *capias ad respondendum* issued in this case authorized the imprisonment, and therefore no action of false imprisonment would lie. Whether there was

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(1) 4 B. & C. 247.



a malicious prosecution and arrest, depends upon whether the defendant in causing the plaintiff to be arrested had any proper cause for the suit, and was actuated by malice in the proceeding. The circumstance relied upon as proof of this, was that a judgment had been obtained against the defendant on the note on which the action was brought, in the name of another party before a Justice of the Peace, and that there could be no cause of action for the same demand by the defendant. And the first question which arises is whether there was a judgment. I think there was.

1890.  
 BYRAM  
 v.  
 JOHNSTON.  
 Palmer, J.

It is true, that the course of proceeding laid down in the Justice of the Peace Act for proceedings before Justices in civil cases was not pursued; but it is apparent that those directions are entirely applicable to hostile proceedings. There is no necessity for any direction for proceedings to be taken in any Court to enable a party to confess judgment, or to confess that he has no cause of action which would authorize the Court to enter this of record, and if this is assented to by the other side, it is the proper foundation of the adjudication against which the party properly consenting cannot himself object, nor can the other side when once he has properly assented to it; the matter is passed upon and is *res judicata*, and cannot be opened again except for fraud or mistake. But it is not clear that the mere obtaining of a judgment upon a note in the Court of a Justice of the Peace extinguishes the debt. It is not a court of record, and its judgment does not make it a debt of a higher nature than the original debt itself. There is no pretence that it has ever been paid, and therefore I think the existence of such a debt, although there was a judgment upon it in a Justice's Court, might be a reasonable and probable cause of bringing the suit therefor that was brought; and all the circumstances of the case are proper subjects for the jury on the question of actual malice, and they having found for the defendant I do not think there is any ground to disturb the verdict.

SIR JOHN C. ALLEN, C. J. A material question in this case is, whether Justice LaBelle had any authority to sign judgment against the present plaintiff, for the amount of the

1890.

BYRAM

v.

JOHNSTON.

Allen, C. J.

notes—he not being a resident in the parish in which the Justice resided.

The 6th sect. of cap. 60 of The Consolidated Statutes, relating to “Justices’ Civil Courts,” enacts that “No Justice shall hold a Court for the trial of any action under this chapter, unless the plaintiff or defendant, or some one of the plaintiffs or defendants resides in the parish in which such Justice resides; or, unless the plaintiff or defendant or some one of the plaintiffs or defendants is a non-resident of the county.”

That section was amended by the Act 42 Vic. cap. 13, which enacts that upon the trial of any cause in certain Courts established for the recovery of small debts, including the Courts of Justices of the Peace, “it shall not be necessary to prove that the plaintiff or defendant, or some one of the plaintiffs or defendants resides in the town or parish in which such Court is situate, or in which such Justice of the Peace resides, unless the objection upon that ground is made upon the said trial; provided that (except in cases of suits for or against non-residents of the county, provided by sec. 6 of cap. 60 of Consolidated Statutes), nothing herein contained shall authorise the entry of judgment by default, unless the plaintiff or defendant or one of them reside in the parish where the aforesaid Justice or Judges of said Courts reside.”

The first branch of this section does not apply to this case, because neither Byram nor the plaintiff in that case, appeared before the Justice at the return day of the summons. Nor do I think that the proviso applies to this case, because the judgment signed by the Justice was a judgment by confession and not a judgment “by default,” in the sense in which I think that expression is used in the Act.

A judgment by confession and a judgment by default are different proceedings, though the effect of them may be practically the same. The former is the result of an act done by the defendant in the suit, and may be given before declaration filed: *McNamee v. O'Brien* (1); the latter is obtained because the defendant is passive, and does nothing. See *Tidd's Pr.* (9th ed.) 559-562.

I can see no objection to the defendant in a suit in a Justice's

Court giving a confession at or before the return of the summons. If he had appeared at the return of the summons, and defended the suit (not raising the question of jurisdiction), and the decision had been against him, he could not afterwards object that the Justice had no jurisdiction to try the case, because he (the Justice) and the defendant resided in different parishes: he had by the express words of the statute waived his right to object to the jurisdiction. Why can he not also waive that right by giving a confession before the day of trial? He is the only person who could be prejudiced by the Justice issuing a summons and signing a judgment by default against him if he and the Justice resided in different parishes; but by confessing a judgment without attending the trial, I think he is estopped from taking the objection.

1890.

BYRAM  
v.  
JOHNSTON.  
Allen, C. J.

The case is distinguishable from *Wright v. Parlee* (1), because there the Justice took upon himself to enter a nonsuit without any application therefor by the defendant, who was not present. Here, the Justice had the express consent of the defendant to sign judgment against him for the amount claimed by the plaintiff. I therefore think that no question arises as to the jurisdiction of the Justice, nor as to the validity of the judgment.

The next question is, whether the notes were merged in the judgment. I think they were not. The Courts of Justices of the Peace, created by statute in this Province for the trial of civil suits to a limited amount, are not Courts of Record, and their judgments do not import absolute verity. *Young v. Woodcock* (2); *Jackson v. O'Donnell* (3); *Wright v. Parlee* (1).

In *King v. Hoare* (4), Parke, B., delivering the judgment of the Court, said that if a judgment is recovered in a Court of Record, the judgment is a bar to the original cause of action, which is changed into matter of record—a security of a higher nature in which the inferior remedy is merged—and cannot be the subject of another suit. *Atkinson v. Keith* (5) affirms the same principle. That was an action in this Court—a Court of Record—and there was no such question in it as arises in the present case. Assuming, then, that the original cause of action on the notes was not merged in the judgment

(1) 3 Puga. 381.  
(2) 3 Kerr 554.

(3) 2 Puga. 60.  
(4) 13 M. & W. 404.

(5) 5 All. 305.

1890.

BYRAM  
v.  
JOHNSTON.

Allen, C. J.

in the Justice's Court, I see nothing to prevent the present defendant, as indorsee of the notes, from bringing an action upon them against the plaintiff, the maker of them.

In principle, the case resembles that of a foreign judgment, which has been held not to be a debt of record, and that the original cause of action on which the judgment was recovered was not merged, and might be sued upon here. *Fergus v. Wardlaw* (1). See also *Bank of Australasia v. Harding* (2).

Then, does the judgment operate as an estoppel; and would it prevent Cossitt, the payee of the notes, or the present defendant, Johnston, as the indorsee, from suing the plaintiff upon them? I think the judgment does not so operate, for two reasons. First—because Johnston, in the suit which he brought against Byram on the notes, was not seeking to set up any claim adverse to the judgment in the Justice's Court, but, to obtain payment of the same debt for which Byram was sued there; and secondly—because Johnston had no knowledge of the existence of the judgment when he arrested the plaintiff in the suit on the notes.

The question of estoppel arises where a person against whom a judgment has been obtained, or whose rights have been determined in a Court of competent jurisdiction, is endeavouring by a suit or proceeding in another Court, to get rid of the effect of the former judgment. But that was not the case in the suit brought by Johnston against Byram. I think, therefore, the substantial question is whether Byram's indebtedness on the notes was merged in the judgment obtained against him in the Justice's Court, so that no action could be brought upon them.

One of the questions left to the jury, and on which they found in part against the defendant was, whether Johnston authorized the bringing of the action against Byram in the Justice's Court; or, if he did not do so, whether after knowing of the action being brought, he adopted it by paying the costs? (i. e., the costs of the Justice and constable.)

The jury found that Johnston adopted the action by paying the costs.

I think there was exceedingly slight evidence to support such a finding.

There is uncontradicted evidence that Johnston, acting as agent for Cossitt, never authorized the suit to be brought upon the notes by Justice LaBelle, and that he had no actual knowledge of the existence of the judgment against the plaintiff, until after he (Johnston) had brought the suit against him on the notes. He swore positively that the first time he had any knowledge of the notes having been sued, was on the trial before the police magistrate in the suit brought by him (Johnston) against Byram on the notes; and that no person had any authority from him, express or implied, to sue the notes before Justice LaBelle.

1890.  
BYRAM  
v.  
JOHNSTON,  
—  
Allen, C. J.  
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The circumstance relied on by the plaintiff in this action to shew that Johnston knew that Byram had been sued before the Justice, was that in the settlement of his account with a Mr. Clark, who acted as his agent in Woodstock in collecting debts owing to him (Johnston), he had paid the costs of the suit brought by the Justice against Byram.

Johnston had sent the notes to Clark to collect the amount, and Clark had sent them to Madawaska, where Justice LaBelle resided, and the costs of the suit before the Justice had been paid by Clark.

The defendant swore that in sending claims to Clark to collect, he directed him not to commence suit on them without special instructions. He admitted that Clark did sometimes sue without any authority from him, and that he sometimes paid Clark the costs incurred in such suits, and sometimes he refused to do so; and that he did not know whether he had paid any costs in the suit brought before Justice LaBelle against Byram.

The statement principally relied on by the plaintiff's counsel to shew that the defendant had paid those costs, was, his answer on cross-examination to the following questions: "At the time you settled with Clark, on some occasion, you might have been told by him that Byram had been sued on the notes before LaBelle, and that judgment had been obtained against him on them. Was that possible?" A.—"It was possible that I might have been so told."

On re-examination, the defendant said he did not think it was possible that those costs could have been included in Clark's account with him, and he stated as the costs in a suit

1890.  
BYRAM  
v.  
JOHNSTON.  
—  
Allen, C. J.

on the notes, and that he (Johnston) would not remember it. That if it was a small item in a lengthy account, it might have been charged there, and he not know it; but he had not at any time his attention called to the fact that there were certain costs which had been paid in the suit against Byram before the Justice, and that he (Johnston) found them there and allowed them in his account with Clark.

The most that can be made of the defendant's evidence on this point is, that it was possible that Clark might have told him of the judgment against the plaintiff in the Justice's Court; and that it was also possible that he (Johnston) might have paid the costs in settling his account with Clark; but not that it was probable that either of those facts took place. I do not think that it amounted even to a preponderance of evidence in favor of the plaintiff's contention that Johnston knew of the judgment. See 1 Stark. Evid. 817.

I should judge, from reading his evidence, that the defendant was very particular, cautious and conscientious in answering the questions put to him, and not that he was endeavoring to evade answering them.

I think there was very weak evidence to sanction the finding of the jury that the defendant had paid the costs of the judgment; but it is unimportant whether he did so or not, if the notes were not merged in the judgment.

If they were not merged, the defendant cannot be liable in this action, either for false imprisonment or for malicious arrest. Not for the first, because the *capias* on which the plaintiff was arrested was good on its face, and there was a sufficient affidavit to justify it, and the Court had jurisdiction, and all the defendant did was to swear to that affidavit, and instruct his attorney to issue a *capias*. Neither was he liable for a malicious arrest, because Byram unquestionably owed the debt for which he was arrested, and the original debt was not merged in the judgment. See *Barker v. Braham* (1); *Belk v. Broadbent* (2); *Codrington v. Lloyd* (3); 1 Chit., Gen. Prac. 48.

As to the right of the learned Judge to refuse to accept a verdict for the plaintiff and to direct a verdict to be entered for the defendant, the facts were these: When the learned

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(1) 3 Wils. 368.

(2) 3 T. R. 183.

(3) 8 A. & E. 449

Judge had concluded his directions to the jury he told them that they were not to find a verdict for either party, but he should leave certain questions to them to answer, and upon their answers he should direct whether the verdict should be entered in favor of the plaintiff or the defendant. When the jury returned into Court they answered the questions left to them, and said that they found a verdict for the plaintiff. The learned Judge then pointed out to them that that was not according to his direction to them, saying that according to their answers to the questions the defendant was entitled to the verdict, and directed them so to find, and they did then find a verdict for the defendant, the clerk of the Court having put the usual question to them, whether they found for the plaintiff or for the defendant.

1890.

BYRAM  
v.  
JOHNSTON.  
Allen, C. J.

If the jury had not so found, I should have doubted the right of the Judge to decline to receive the verdict for the plaintiff which they first announced (but which was not recorded), and to enter a verdict for the defendant. See *Hughes v. Sutherland* (1). That would seem to me to be a verdict of the Judge, and not of the jury. But the ultimate finding in favor of the defendant, gets rid of the objection.

There is one more point arising out of the discussion as to the effect of a judgment in a Justice's Court, which I desire to refer to, though it does not affect the question in this case; and that is, the time when the statute of limitations begins to run against such a judgment. It has been said that twenty years is the period, according to the Consol. Stat. cap. 85, which declares that: "No action or *scire facias* upon any judgment, recognizance, bond, or other specialty shall be brought but within twenty years after the cause of action." Now, no doubt the words "*any judgment*" might, by themselves, include a judgment recovered in a Justice's Court; but read in connection with the words which follow them, I cannot doubt that they mean judgments of Courts of record only. *Noscitur à sociis*.

I think a new trial should be refused.

WETMORE, J., thought that there should be a new trial.

FRASER, J., took no part.

*New trial refused.*

1889.

## LEVESQUE v. NEW BRUNSWICK RAILWAY CO.

October 10.

*Railway company—Breach of statutory duty—Neglecting to erect fences and cattle guards—Action for damages resulting therefrom—Dominion Railway Act 42 Vic., cap. 9, sec. 27—Inconsistent legislation of Dominion statute and Provincial Act—British North America Act, sec. 92—Limitation of action—Civil rights—Ultra vires.*

The New Brunswick Railway Co. was incorporated before the union of the Provinces under The British North America Act, by the Provincial statute 33 Vic., cap. 49, the 14th sec. of which required the Company to erect and maintain substantial fences on each side of the land taken by them for the railway where it passed through improved land. The 92nd sec. of The British North America Act having excluded from the Provincial Legislatures power over local works which, though wholly within a Province of the Dominion, were declared by the Parliament of Canada to be for the general advantage of Canada, and the Dominion Act 44 Vic., cap. 42, having declared the work of The New Brunswick Railway Co. to be a work for the general advantage of Canada; and the provisions of the Consolidated Railway Act, 1879, having been extended to The New Brunswick Railway Co., so far as they were applicable to the undertaking, and not inconsistent with the several Acts of the Company:

*Held*, 1st. That sec. 13 of "The Railway Act" (Rev. Stat. Can., cap. 109), relating to fencing, was inconsistent with sec. 14 of The New Brunswick Railway Act, and therefore that the Company was bound under the Act of incorporation, to erect the fences without any written request from the occupant of the land, as provided by sec. 13 of "The Railway Act."

2nd. That Parliament having the exclusive right to legislate on the subject of railways, had, as incident thereto, power to limit the time within which actions could be brought for damages sustained by reason of the railway; and therefore that sec. 27 of cap. 109, which limited the right of action to six months after the alleged damage was sustained, was not *ultra vires*. (WETMORE, J., dissenting.)

3rd. That the words of sec. 27—"injury sustained by reason of the railway"—were not confined to neglect in running the trains, nor to improper construction of the railway, but extended to damage arising from the improper construction of cattle guards, and from neglect to fence the railway, as directed. (WETMORE, J., dissenting.)

*Quære*—Whether that part of sec. 27 which authorizes the Railway Company, in an action for damage, to plead the general issue and give the special matter in evidence, is *ultra vires*.

4th. If damage is sustained by a person in consequence of the neglect of the Railway Company to erect fences on each side of the railway, as directed by Act 33 Vic., cap. 49, sec. 14, an action will lie therefor. *Couch v. Steel*, 3 E. & B. 402, followed.

*Quære*—Whether an action could have been maintained if the statute had imposed a penalty for neglecting to erect fences.

This was an action brought to recover damages for killing the plaintiff's horse, in consequence of the alleged negligent construction of the defendants' railway, and also for damages by cattle straying on his land and depasturing it, by



means of the defendants neglecting to fence their line of railway where it passed through his land.

1889.

LEVESQUE

v.  
NEW BRUNSWICK RAILWAY CO.

At the trial, which took place before His Honor the Chief Justice, at the Madawaska Circuit, in September, 1887, a verdict was entered for the plaintiff, with leave reserved for the defendants to move to enter a nonsuit, or to reduce the verdict and enter it on all or any of the counts the Court might think proper, or to enter the verdict for the defendants, or for a new trial.

June 13, 1888. *Weldon, Q. C.*, now moved accordingly, and

*Geo. F. Gregory*, argued contra.

The material facts, as they appeared at the trial, and the arguments of the counsel, are sufficiently stated in the judgments.

*Cur. adv. vult.*

The following judgments were now delivered :

TUCK, J. The declaration in this action contains three counts. It is alleged in the first count, that it was the duty of the defendants to erect and maintain substantial fences, not less than four feet in height on each side of the plaintiff's land, taken by them for their railroad; and for breach it was assigned, that the defendants did not erect and maintain such fences, whereby the cattle, sheep, horses and other animals of the plaintiff, strayed upon the railroad, and were injured, maimed and killed by the defendants, their servants, engines and cars; and whereby also the cattle of other people strayed upon the land of the plaintiff and ate up his crops, grain and herbage. In the second count, the plaintiff alleges that the defendants drove, chased and hurried his cattle so that one horse was killed. The third is a count in trover.

The plea is the general issue, with the following notices of defence: 1st. That the railway does not pass through the plaintiff's land; 2nd. That the lands described in the first count were not enclosed or improved lands; and 3rd. That good and substantial fences were erected and maintained on

1889.  
LEVESQUE  
v.  
NEW BRUNSWICK RAIL-  
WAY CO.  
Tuck, J.

each side of the land taken for the railroad, where the same passed through enclosed or improved lands, and were not receiving and landing places for passengers and freight.

At the trial the first count was amended by adding, after the words "it still is the duty of the defendants to erect and maintain such fences," these words, "and to make sufficient guards, where the said railroad crosses roads and fences, to prevent cattle and other animals straying on the plaintiff's land." And in the breach, after the words, "passes through the said lands as aforesaid," to add the words, "nor have they made sufficient guards where their road crosses fences and public roads to prevent cattle straying on the plaintiff's lands; and after the words "grass and herbage of the said plaintiff thereon," to add, "and the plaintiff was prevented from using and enjoying his land, as fully as he might and otherwise would have done."

The plea was amended by inserting in the margin, the words "Revised Statutes, cap. 109, sec. 27," and adding three notices; the first two as to the statute of limitations, and the third as to contributory negligence.

No witnesses were called by the defendants. Motion was made for a nonsuit, which was refused; but the counsel made an agreement that damages should be assessed as follows: From the 21st May, 1881, till the 21st November, 1886, fifty dollars; from the 21st November, 1886, till the 21st May, 1887, ten dollars; and for the horse, two hundred and fifty dollars; also that the verdict should be for the plaintiff for three hundred and ten dollars, with leave reserved for the defendants to move to enter a nonsuit, or reduce the verdict, and enter it on all or any of the counts the Court may think proper, or to enter the verdict for the defendants, or for a new trial.

The evidence shews that the defendants' railroad passes through the plaintiff's land, which was improved and good land throughout the whole distance where the railway passes. Near the plaintiff's house, the railway was not fenced, so that cattle, sheep and horses got upon the track, and on the 3rd of September, 1886, the plaintiff's horse, which was hopped at the time, was, whilst on the track, struck by a passing train, and injured so seriously, that it had to be killed. It appears further from the evidence, that where the railway crosses roads

and fences, there was not sufficient guards to prevent cattle and other animals straying on the plaintiff's land. From May, 1881, till May, 1887, cattle and animals belonging to other people did stray on to plaintiff's land and ate grass, hay and grain.

1889.  


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 LEVESQUE  
 v.  
 NEW BRUNSWICK RAILWAY CO.  


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 Tuck, J.  


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The defendant company was incorporated by Act of Assembly, 33 Vic., cap. 49. Sec. 14 of this Act provides that the company shall erect and maintain substantial fences, not less than four feet in height, on each side of the land taken by them for the railway, where the same passes through inclosed or improved lands. Such fences, however, may be dispensed with at the receiving and landing places of passengers and freight.

Sec. 27, cap. 109, Rev. Stat. of Canada, "The Railway Act" enacts: "All actions or suits for indemnity for any damage or injury sustained by reason of the railway, shall be commenced within six months next after the time when such supposed damage is sustained, or if there is continuation of damage, within six months next after the doing and committing of such damage ceases, and not afterwards; and the defendants may plead the general issue, and give this Act and the special Act, and the special matter in evidence at any trial to be had thereupon, and may prove that the same was done in pursuance of and by the authority of this Act and the special Act."

Section 13 of this Act provides that the company shall erect and maintain fences and cattle guards in the manner therein stated, after it has been required so to do, in writing, by the occupant of the land.

By the Dominion statute 44 Vic., cap. 42 (Local and Private), sec. 1, it is enacted that the work of the New Brunswick Railway Company is declared to be a work for the general advantage of Canada: so that this company was governed by the Dominion Consolidated Railway Act, 1879, and that Act applies to this railway. Sec. 92 (10) of the British North America Act, excludes from the powers of Provincial legislatures, local works and undertakings, such as, although wholly situate within the Province, are before or after their execution

1889.

LEVESQUE

v.

NEW BRUNSWICK RAIL-

WAY CO.

Tuck, J.

declared by the Parliament of Canada to be for the general advantage of Canada.

It is contended that no action will lie at the suit of a private individual for breach of a general statutory duty; and reference was made to several cases, as being authority for that contention. *Hammond v. The Vestry of St. Pancras* (1) decides, that in the absence of negligence on their part, a vestry or local board is not responsible for any injury resulting to an individual from disrepair of a sewer. This case turned upon the construction of section 72 of the Metropolis Local Management Act (18 & 19 Vic., cap. 120), which, the plaintiff contended, imposed upon the vestry an absolute duty to cause the sewers vested in them to be "properly cleared, cleansed and emptied," so as not to be a nuisance or injurious to health. But the Court held, that upon the proper construction of that section, the vestry were not liable for not keeping their sewers cleansed, at all events and under all circumstances. The question was left to them, and the jury found that the vestry were guilty of no negligence, and Denman, J., said it was not intended by the section to make them liable, unless they were so guilty.

In *Vallance v. Falle* (2) the action was for the refusal to give to a seaman the certificate of discharge directed to be given by the 172nd section of the Merchant Shipping Act, 1854, and the Court decided that the only remedy for such refusal was the penalty provided by that section. This case also depended upon the construction of the statute.

It was said that there is no averment of negligence on the part of the defendants. The declaration avers that it was the duty of the company to erect and maintain fences, and because of their failure to do so the plaintiff was damnified. It appeared from the evidence that the defendants did not erect and maintain fences over the plaintiff's land, whereby he was injured. Their Act of incorporation makes it imperative that they should erect fences, and there was evidence to justify a jury in finding negligence. *Couch v. Steel* (3), cited by Mr. Weldon at the argument, is a direct authority against him, for in that case Lord Campbell, C. J., says: "Upon principle then, as well as upon authority, we think that the plaintiff's

(1) L. R. 9 C. P. 316.

(2) 13 Q. B. D. 109.

(3) 3 E. &amp; B. 402.

right, by the common law, to maintain an action on the case for special damage sustained by the breach of a public duty is not taken away by reason of the statute which creates the duty imposing a penalty, recoverable by a common informer for neglect to perform it, though no actual damage be sustained by any one."

1889.  
LEVESQUE  
v.  
NEW BRUNSWICK RAIL-  
WAY CO.  
Tuck, J.

Although the decision in *Couch v. Steel* is questioned by the Judges who decided *Atkinson v. Newcastle Waterworks Co.* (1), still it is here again affirmed that the Court in each case must look to the particular Act to see what was the intention of the legislature.

*Charman v. South Eastern Railway Co.*, on appeal (2), was an action very like the present one. There the suit was brought to recover damages for two horses belonging to the plaintiff which had got on to the defendants' line of railway, and were killed by a passing train. Under the Railway Clauses Act, 1845, the company was obliged to erect, and at all times maintain, good and sufficient gates where the railway crossed any public carriage road on a level. It was for a breach of this duty, which resulted in damage to the plaintiff, that the action was brought. No question was raised at the trial or on the argument that the action would not lie for a breach of a statutory duty, and judgment was entered for the plaintiff. I can find no authority for the general proposition that an action will not lie for the breach of a statutory duty, nor do I think it can be supported on principle.

In my opinion, this contention of the defendants fails.

It was further urged that hopping the horse, that is, tying his fore foot to his hind foot in such a way that he could only walk with difficulty, was contributory negligence, without which the accident would not have occurred.

Upon the evidence, I think the jury was the proper tribunal to decide the question of contributory negligence. This was held in *Bridges v. North London Railway Co.* (3), and in *Robson v. North Eastern Railway Co.* (4). It is not for the Court to say that hopping the horse was such conclusive evidence of contributory negligence, in law, that there was

(1) 2 Exch. D. 441.  
(2) 21 Q. B. D. 524.

(3) L. R. 7 H. L. 213.  
(4) 2 Q. B. D. 85.

1839.  
LEVESQUE  
v.  
NEW BRUNSWICK RAIL-  
WAY CO.  
Taek, J.

no question on this point to be left to the jury. If the defendants relied upon this ground of defence, they should have requested the finding of the jury as to this question. It seems to have been thought by counsel at the trial that in order to give evidence of contributory negligence, it was necessary to plead specially. But this is not so. Such evidence is admissible under the general issue.

Now, as to the duty of the defendants to erect fences where the railroad crosses the plaintiff's land. By their Act of incorporation, the company were bound to erect and maintain substantial fences in the manner specified in section 14.

The defendants contend that as they were not required in writing, by the plaintiff, to erect and maintain fences over his land, in the manner prescribed in section 13 of The Railway Act, they are not liable for the damages which he suffered by the absence of fences. It seems to me that this section does not apply to the defendant company, in such a way as to excuse them from doing what they are required to do by section 14 of their Act of incorporation.

Where the special Act incorporating the company rendered it necessary, as in this case, that fences should be erected and maintained over land through which the railway passed, it was not, in my opinion, the intention of the legislature by The Railway Act to repeal that part of the special Act relating to the erection of fences. Before the passing of The Railway Act, or the statute which declares the New Brunswick Railway Company to be a work for the general advantage of Canada, ample provision had been made by the Provincial statute for the erection of fences by the defendant company, and this provision is not, either by words or implication, repealed by the Railway Act. Section 13 has no relation to railways (although governed by the Railway Act) for which special provision has been made, as in this case, for the erection of fences and cattle guards.

According to my view of the law, it is still the duty of the defendants to erect fences, in the manner provided in their own Act of 1870, without being required to do so by a notice in writing. For the reasons already given, it follows that the defendants are liable for any damage which may be suffered

through their negligence, owing to the want of proper fences.

But as regards all the damage which occurred before the 21st November, 1886, the defendants contend that the plaintiff is barred from recovering by section 27 of the Railway Act, which provides that "all actions or suits for indemnity for any damage or injury sustained by reason of the railway, shall be commenced within six months next after the time when such supposed damage is sustained; or if there is continuation of damage, within six months next after the doing or committing of such damage ceases, and not afterwards."

1889.

LEVESQUE

v.

NEW BRUNSWICK RAILWAY CO.

Tuck, J.

If the Parliament of Canada has the power to put the defendant company under The Railway Act, and to limit the time within which actions of negligence may be brought, then it would follow that the defendants' contention in this respect is right. On the other hand, the plaintiff insists that, even admitting the power of the Dominion Parliament to take legislative control of this railway, they had not the power to make this statute of limitations, because it interferes with civil rights.

It is not denied that section 92 (10), of the British North America Act empowers the Dominion Parliament to declare a work, such as that of this railway, to be for the general advantage of Canada. Having made this declaration in relation to the defendant company, the Dominion Parliament has the right to make laws affecting this railway, in the same manner and to the same extent as they may legislate in regard to any subject or class of subjects coming within their exclusive legislative authority. The right of the Parliament of Canada to so legislate is distinctly recognized in a recent case before the Privy Council. *Redfield v. The Corporation of Wickham* (1). In that case it was held, "that the railway undertaking in suit, which had become a Dominion railway before the respondent's writ of *fi. fa.* issued, and was governed by Dominion Act, 46 Vic., cap. 24 (amendment of Consolidated Railway Act), could be seized and sold, subject to its mortgages, for the debts of the company to which it belonged." Apparently the Court in that case were not called upon to consider whether an Act which recognized the right to take in execution and sell

1889. the South Eastern Railway was beyond the legislative power  
 LEVESQUE of Parliament. Before this railway had been seized and sold,  
 v. it had been conveyed to the trustees of certain bondholders for  
 NEW BRUNSWICK RAILWAY CO. valuable consideration. Doubtless these bondholders thought  
 Tuck, J. that the sale of this railway was an interference with their  
 civil rights, but they did not think it worth while to set up the  
 contention.

Bankruptcy and insolvency are among the classes of subjects within the exclusive legislative authority of the Parliament of Canada. There can hardly be legislation upon this subject without affecting property and civil rights in the Province, and yet it is well settled that Parliament is within its power in making laws upon insolvency, although the effect of such laws may be to take property out of the possession of one person, and put it in that of another. When the Parliament of Canada has the right to legislate upon a given subject, they have the power to make such provisions relating to that subject, as may be necessary to enforce and carry into effect their legislation.

Procedure forms an essential part of laws dealing with railways, as it does with laws relating to insolvency. When the Parliament of Canada acquired the right to make laws to govern the defendants' railway, power was given by implication to interfere with property and civil rights in the Province, so far as a general law relating to this subject might affect them. This is decided by *Cushing v. Dupuy* (1). I think, then, that section 27 of The Railway Act is not *ultra vires* the Parliament of Canada.

But even if that is so, Mr. Gregory urges that this is not such an injury as is contemplated by the Act. Section 27 says "damage sustained by reason of the railway." The words are the same as those used in Consol. Stat. Can., cap. 66, sec. 83. Under that statute, in *Browne v. Brockville and Ottawa Railway Co.* (2), it was decided, in a case similar to this one, that the cause of damage, namely, the improper construction of a crossing, came expressly within the words of the statute; that it was a damage or injury by reason of the railway. Here the plaintiff alleges that the killing of his horse and the depasturage of his land were caused by improper or imperfect guards, and

(1) 5 App. Cas. 409.

(2) 20 U. C., Q. B. 202.



the want of fences as required by law. Substantially, the plaintiff charges improper management of the railway. The damage in the present case was by reason of the railway.

A further contention by the plaintiff is, that as this was a continuing damage, owing to fences not being erected, the killing of the horse was a part of the continuing damage, and the six months limit should not apply. It seems to me that this is not a case of continuation of damage, within the meaning of the exception in sec. 27, cap. 109. The horse was injured by a train of cars, and this must be referred to the time of the accident, the 3rd September, 1886. In my opinion, whatever damage the plaintiff sustained by reason of the railway, prior to the 21st November, 1886, is barred by the statute.

No evidence was given of any special damage between that time and the 21st May, 1887, and therefore, I think, to cover the period between the 21st November, 1886, and the 21st May, 1887, there should be a verdict for the plaintiff for ten dollars, amount agreed upon at the trial for depasturing by cattle, sheep and other animals.

My conclusion is, that a verdict for ten dollars be entered for the plaintiff on the first count of the declaration, and a verdict for the defendants on the other two counts.

KING, J. The declaration alleges that the defendants owned and managed a railroad running through plaintiff's land; that it was declared by statute to be the duty of defendants to erect and maintain sufficient fences where the railway runs through enclosed or improved lands, except at places where the railway has its stations, etc., and except where fences are not ordinarily required; that plaintiff's land on either side of the railway was enclosed and improved land, and that it was neither a place where defendants had a station, nor a place where fences were not ordinarily required; that therefore it became and was the duty of defendants to erect and maintain sufficient fences along the railway where it passes through plaintiff's land. It then alleged a breach of this duty, and charged that by means of this neglect a horse of plaintiff got on the railway track, and was run over and killed by an

1889.

LEVESQUE

v.

NEW BRUNSWICK RAILWAY Co.

Tuck, J.

1889.  
LEVESQUE  
v.  
NEW BRUNSWICK RAIL-  
WAY CO.  
King, J.

engine of defendants'; and that cattle also got upon plaintiff's land and depastured it.

Upon the trial, an amendment was made, alleging a duty to erect cattle guards, and a breach; whereby, etc.

The defendants pleaded not guilty, and gave notices of defence, not necessary now to be further referred to, except that they noted in the margin, "By Statute 42 Vic, cap. 9, sec. 27, sub-sec. 1," and by amendment gave notice of the Statute of Limitation and contributory negligence.

The enactment 42 Vic, cap. 9, sec. 27 (the Consolidated Railway Act, 1879), is as follows: "All suits for indemnity for any damage or injury sustained by reason of the railway, shall be instituted within six months next after the time of such supposed damage sustained, or if there be continuation of damage, then within six months after the doing or committing such damage ceases, and not afterwards; and the defendants may plead the general issue, and give this Act and the special Act, and the special matter in evidence at any trial to be had thereupon, and may prove that the same was done in pursuance of and by the authority of this Act and the special Act."

Upon the trial it appeared that directly in front of plaintiff's house, and about one hundred feet to the south of it, was the highway. This was crossed by the railway a little to the eastward. To the west or up-river side of the point of intersection, the highway was (as said before) the nearer, to plaintiff's house and the highway and railway ran almost parallel for a way; to the eastward of the point of intersection they diverged more.

Previous to the railroad being constructed, there had been a fence on each side of the highway; but at the time of the construction of the railway the plaintiff removed the fence along the highway on the side next to his house, leaving an open space between the highway and his house. The fence on the other side of the highway was knocked down during the construction of the railway, and the plaintiff removed the fence rails. The plaintiff never required the defendants to erect fences. There were however fences at certain places. Thus to the west of plaintiff's house, there was a fence along the north side of the highway; and to the east of plaintiff's house

there was a fence along both sides of the railway; and the plaintiff had built fences from at or near his house, south-westerly connecting with the fence along the highway, and south-easterly connecting with the fence along the railway. There was also a fence at plaintiff's east side line forming the side of a bye-road running north and south, and intersecting both railway and highway. There was a cattle guard on the railway where it crossed the bye-road, and there was also a cattle guard at or near the intersection of the highway with the railway, nearly in front of plaintiff's house. The state of the land as to fencing may then be said to be, that there were fences except along in front of plaintiff's house; and that in this space there was neither a fence at the side of the railway or the highway. The plaintiff's alleged damage was, as stated, of two kinds: the loss of his horse and the depasturing of his lands. These have to be separately considered.

The plaintiff turned his horse loose in the open space in front of his house, first tying the fore and hind foot on one side to prevent him straying away. A train in regular course came from the west in about half an hour, and the horse, on hearing or seeing the train coming, ran as well as he could down along the fence running south-easterly from near the house to the railway fence. When he got to the point of intersection of the highway and the railway, he turned to the eastward to run along the track, and the train was coming on behind him. He attempted to jump the cattle guard, but by reason of the fastenings upon his legs he fell, and the train ran over him and so injured him that he had to be destroyed.

The action was not brought until about eight months after the accident. The value of the horse was by consent of counsel put at \$250.

Next, as to the depasturing. This arose from cattle coming from the eastward by way of the bye-road, and entering upon the railway track through defective cattle guards at the point where the bye-road fence was intersected by the railway track. It is not quite clear where the depasturing took place. I think, however, that it was on the triangular piece between the railway and the highway and bye-road. The plaintiff claimed damages for this over a period of several years, and

1889.

LEVESQUE  
v.  
NEW BRUNSWICK RAILWAY CO.  
King, J.

1889.  
LEVESQUE  
v.  
NEW BRUNSWICK RAIL-  
WAY CO.  
King, J.

down to the time of action. Damages were by consent assessed at \$50 for the five and a half years before November, 1886, and at \$10 for the six months from November, 1886, to May, 1887, when the action was brought.

Mr. *Weldon*, for the company, contends that they are not bound to fence, in the absence of a request by the landowner; and he bases his argument upon section 16 of the Consolidated Railway Act of 1879. That section declares that "within six months after any lands have been taken for the use of the railway, the company shall, if thereunto required by the proprietors of the adjoining lands, at their own costs and charges, erect and maintain on each side of the railway, fences of the height and strength of an ordinary division fence \* \* \*; and also cattle guards at all road crossings, suitable and sufficient to prevent cattle and animals from getting on the railway."

By 44 Vic., cap. 42 (Acts of Canada), the defendant company is declared to be a work which, though wholly in one Province, is for the general advantage of Canada; and becoming thus, under the provisions of the British North America Act, the subject of Dominion legislation, the Act 46 Vic., cap. 59, extends to it the provisions of the Consolidated Railway Act of 1879, so far as such provisions are applicable to the undertaking, and are not inconsistent with the provisions of the special Acts of the company. The special Act (or one of the special Acts) of the company is 33 Vic., cap. 49 (Acts of New Brunswick). By section 14 of this Act it was enacted that the company should erect and maintain substantial fences on each side of the land taken by them for the railway, where the same passed through enclosed or improved lands, but that such fences may be dispensed with at the receiving and landing places of passengers and freight, and at places where fences are not ordinarily required. This enactment imposes an absolute obligation upon the company, while the Consolidated Railway Act of Canada makes the obligation conditional upon a request by the land owner. Mr. *Weldon's* argument is that sec. 14 of the special Act is repealed by the extension of the Consolidated Railway Act to this company. But, in the first place, there is no express repeal of sec. 14 of the special Act; and if it is repealed impliedly, this must be because the provisions of the

later Act are inconsistent with the former Act; but if they are thus inconsistent, then the Dominion Act does not, as to such conflicting provisions, extend and apply to the defendant company; because the provisions of the Consolidated Railway Act are extended to this company only so far as applicable and not inconsistent with the special Acts. There cannot, therefore, in this case, be any implied repeal of the earlier and special statute. Then Mr. *Weldon* contends that the duty to fence imposed by statute is a public duty, for the breach of which there is no right of action to a party specially damnified. In all such cases the question is one of construction of the particular Acts imposing the obligation. There may be Acts imposing a public duty in respect of which no action will lie by an individual sustaining special damages by breach of duty through mere omission without negligence. *Blaklee v. St. John Water Co.* (1), *Gibson v. Mayor of Preston* (2), *Hammond v. Vestry of St. Pancras* (3), *Atkinson v. Newcastle Waterworks* (4), *Vallance v. Falle* (5), furnish instances of such Acts.

On the other hand, the numerous cases in this Court against the City of St. John and other municipal corporations for breach of statutory duty to keep streets in repair, illustrate another class of Acts, viz: those where, upon the construction of the Acts, the breach of the public duty gives a right of action to persons specially damnified thereby. *Couch v. Steel* (6) is a like instance. Many others might be cited on both sides. In *Couch v. Steel* it was laid down as a general proposition that wherever special injury to individuals is caused from the breach of statutory duty an action will lie; but this was questioned by the Court of Appeal in *Atkinson v. Newcastle Waterworks Co.* (4); and it has come to be settled, that in each case it is a matter of construction of the particular statutes, having in mind, of course, as elements in construction, the history of the law upon the subject dealt with, and the nature of the obligation and of the subject matter. See also upon the point, *Hammond v. Vestry of St. Pancras*, already cited.

Now, here, by the Dominion Consolidated Railway Act of

1889.

LEVESQUE  
v.  
NEW BRUNSWICK RAILWAY CO.  
King, J.

(1) 1 All. 639.

(2) L. R. 5 Q. B. 218.

(3) L. R. 9 C. P. 316.

(4) 3 Exch. D. 441.

(5) 13 Q. B. D. 109.

(6) 3 E. &amp; B. 402.

1889.  
LEVESQUE  
v.  
NEW BRUNSWICK RAIL-  
WAY CO.  
King, J.

1879 (sec. 16, sub.-sec. 2), the right of action for damages done by the trains to cattle, horses or other animals, by reason of omission to fence and make cattle guards, as required by sec. 16 of the Act, is expressly given or recognized. But Mr. *Weldon* is not bound by that, because he is denied the provisions of sec. 16, which make in his favor, viz., the making the obligation to fence conditional upon a request of the land owner. The Provincial Act does not in terms give a right of action to one sustaining injury by the omission to fence. And by sec. 27 (4) of the Dominion Consolidated Railway Act any contravention of the special Act by the company, for which no penalty is provided, is declared to be a misdemeanor. But, notwithstanding this, I am clear that, having regard to the subject matter, it was the intention of the legislature in 33 Vic., cap. 49, that there should be a right of action for damage to an individual land owner injured by the breach of the statutory duty to fence. What is being dealt with by the Legislature is the relation of one occupier of land to an adjoining occupier of land, and the obligation is imposed on the railway company to fence where the adjoining land is enclosed or improved land. It is the ordinary right of a land owner, to whom another has an obligation to fence, to enforce his right by action; and it is reasonable to suppose that it was intended that breach of the statutory duty imposed by the Act should have the ordinary incident attaching to an obligation to fence, and should be followed by right of action in the adjoining land owner (for whose benefit the obligation is, I think, chiefly imposed) to recover damages sustained by him through breach of such obligation.

Next, as to the limitation of the action. Section 27 of the Consolidated Railway Act, already cited, provides that all suits for indemnity for any damage or injury sustained by reason of the railway shall be instituted within six months next after the time of such supposed damage sustained, or if there be continuation of damage, then within six months next after the doing or committing such damage ceases, and not afterwards. This bars out the plaintiff's claim for damages by reason of the loss of the horse, and of the larger part

of the claim for the depasturing, unless it can be met. Accordingly, Mr. *Gregory* makes several contentions for plaintiff. He contends that the section applies only to injuries or damages done by the negligent running of the railway, and not by the improper construction of the railway. I am not sure but the actionable default of defendants in this case partakes as much of one of these characters as the other. The bare omission to fence would work no such damage as that complained of in the loss of the horse. The damage is caused by the running of the train without observing the obligation to fence, and is therefore the doing of an act, otherwise lawful, without taking certain precautions to prevent it from being injurious to certain other persons, whose liability to damage could readily be foreseen. Apart from this, however, inasmuch as sub-sec. 2 of sec. 16 makes the company liable for all damages which may be done by their trains or engines to cattle, horses, or other animals, until the fences and cattle guards are duly made, as by the Act is provided (that is to say, provided the adjoining proprietor requires the railway company to fence, etc.), I think it is impossible to give such a narrow construction to section 27 of the same Act, as shall except from the words "damages or injuries sustained by reason of the railway" such damages or injuries as are of the class of those mentioned in sub-sec. 2 of sec. 16.

*Browne v. Brockville and Ottawa Ry. Co.* (1) was a decision upon a similar enactment of Canada before the Union. The damage or injury sustained was from the use of the railway, and it was contended that the Act was to be confined to cases where the damage or injury was sustained by reason of the improper construction of the railway. That was the converse of Mr. *Gregory's* contention. It was held, however, that the words "by reason of the railway" are very comprehensive, and cover both injury or damage sustained on the railway by reason of the use made of it, and injury or damage sustained on the railway by reason of its improper construction.

In *McCallum v. Grand Trunk Railway Co.* (2), where damage was sustained by leaving dry wood to accumulate on the

1839.

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LEVESQUE  
v.  
NEW BRUNSWICK RAILWAY CO.  

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King, J.

(1) 20 U. C., Q. B. 207.

(2) 30 U. C., Q. B. 122.

1889.

LEVESQUE

v.

NEW BRUNSWICK RAILWAY CO.

King, J.

track, which became ignited by the engine, it was held that this was a damage by reason of the railway.

It was next contended by Mr. *Gregory* that the Act was *ultra vires* the Dominion Parliament, on the ground (as contended), that the passing a statute of limitations is not incidental to powers exercised in dealing with railway legislation. It was admitted that, where a right is conferred by an Act of Parliament, a limitation of the right of action in respect of it may be imposed; but it is contended that here the plaintiff's claim or right rests on a Provincial statute. But it seems to me that if the Dominion Parliament have the power to confer the right, or to take away the right altogether (as I think they must have when they acquire plenary powers of legislation under the terms of The British North America Act, as they have done in this case), they have the power to set bounds to the enforcement by action of the right. This is substantially a limiting of the right.

It was also contended that the Dominion Parliament has no power to enact that the Company may plead the general issue and give the Act and the special Act and the special matter in evidence. In *Valin v. Langlois*, it was said very reasonably that procedure is a necessary part of legislation respecting insolvency and bankruptcy. The like cannot be said of an Act of this sort. I have not been convinced, thus far, of the power of the Dominion Parliament to legislate as to pleadings in the Courts of civil jurisdiction established by provincial laws in an Act relating to railways. But the necessity to decide does not arise, because at the trial the defendants applied for and obtained leave to amend by adding a plea or notice (which amounts to the same thing), that the six months had expired.

The loss of the horse having then occurred more than six months before action brought, the statute prevents recovery. I may add, that in my view of the evidence, there are other reasons why the plaintiff is not entitled to recover for the horse. The horse got on the railway at the intersection of the highway with the railway, and therefore at a point where defendants are not bound to fence, for they were not bound to fence between the highway and plaintiff's house, and so the



damage was not caused by breach of duty to fence. Further, sec. 79 of the Consolidated Railway Act provides that no cattle shall be allowed to be at large on any highway within half a mile of any railway, and sec. 81 provides that no person whose cattle so being at large are killed by any train at the point of intersection of the railway and highway, shall have any action against the railway company, in respect of the same being killed.

1889.  
LEVESQUE  
v.  
NEW BRUNSWICK RAIL-  
WAY Co.  
King, J.

Next as to the depasturing. The damages given to November, 1886, are barred by the limitation clause unless this is a case of continuation of damages within the meaning of the clause, in which case the right of action continues until the expiration of six months after the doing or committing the damage ceases. I must confess to inclining to the opinion that the continuing of defective fences, thus allowing cattle to get upon plaintiff's land and depasture it, (this being the natural result of the fences being allowed to remain in a defective condition) is a continuing damage within the meaning of the section. I understand, however, that my brethren hold a different view, and I do not dissent as to it. There remains only the claim for depasturing within the six months before action, for which \$10 are assessed. This was occasioned by cattle getting through the cattle guards at the bye-road and then (I presume) going upon the plaintiff's land to the south of the railway, and between that and the highway, by reason of defects in the fences there. The Provincial Act does not provide for cattle guards at all. The provision of the Dominion Act as to cattle guards is therefore applicable to this company; but the Act requires a request by the land owner before the obligation is complete; and there was no request here. But in any view the cattle would have done no harm to plaintiff by simply getting on the track through defects in the cattle guards. They could do harm to plaintiff only by passing from the track to his land through defect or want of fences. This they appear to have done, and there is no answer to this claim of plaintiff. The verdict will therefore have to be reduced to \$10, and for this it will stand.

WETMORE, J. I do not see any reason for disturbing the verdict in this case.

1889. I purpose making some observations in reference to the applicability of section 27 of the Consolidated Railway Act, 42 Vic., cap. 9, as, if this section applies to the present action, the plaintiff's damages must be reduced to \$10, the sum agreed on as damages from 21st November, 1886, to 21st May, 1887, assuming this section to be *intra vires* the Dominion parliament, so as to affect the present suit. The 27th section refers to suits for indemnity for any damage sustained "by reason of the railway." The term "railway" has a specific statutory signification by sub-sec. 16 of sec. 5, which is, "The expression 'railway' shall mean the railway and the works by the special Act authorized to be constructed." So the limit of time for bringing an action by section 27, is confined to damage by the railway and the works by the special Act authorized to be constructed. The damage in the present case was caused by want of proper fences and cattle guards. The damage was not caused by the railway proper, nor by reason of the works by the special Act authorized to be constructed.

LEVESQUE  
v.  
NEW BRUNSWICK RAILWAY CO.  
Wetmore, J.

The defendant company were incorporated by Local Act, 33 Vic., cap. 49. The latter part of section 1 provides, that "all application for damages shall be made within six months from the time of taking such land or other property, or from the time of notifying the owners or occupiers of the intention of the company to take such lands, and not afterwards."

Section 14 of the Act, it seems to me, is outside and entirely beyond the mere building and equipment of the railroad. It casts a separate duty upon the company, for the breach of which, damages may be recovered by a party injured, and would not be classed as an indemnity for any damage or injury sustained by reason of the railway, considering the definition given to the expression "railway" by the Act. While it might include damage caused by the actual running of the trains, or by the works by the special Act authorized to be constructed, I think it would not extend to damage arising from breach of duty imposed by section 14, which I apprehend does not include the railway, or the works authorized to be constructed. Every provision is made for the construction of the railway. The fences are not part of the railway or undertaking. They are to be erected and maintained on each side of the land

taken by them for the railroad. I well understand the term "construction" as applicable to the entire completion of the railway itself, but I do not see how it could be extended to include the erection of a fence on each side of the railway, which is a matter not connected with the construction of the railway. The railway may be completely constructed and in complete running order — and that is all the Act contemplates by the words "and the works by the special Act authorized to be constructed" — without a fence on either side. This erection of fences is a duty, in my opinion, imposed upon the company, entirely outside the construction of the railway itself, and damages occasioned by reason of the failure to erect fences as required by sec. 14, do not come within the purview of sec. 27 of the Consolidated Railway Act.

By sec. 2 of the Act, it is declared that the provisions of the Act, from sec. 5 to sec. 34, both inclusive, being the first part of the Act, should apply to the Intercolonial Railway constructed under 31 Vic., cap. 13; also to every railway constructed or to be constructed under the authority of any Act passed by the Parliament of Canada, and should, so far as they were applicable to the undertaking, and unless they were expressly varied or excepted by the special Act, be incorporated with the special Act, form part thereof, and be construed as forming one Act. It is manifest that neither of these sections, thus far, extends to the defendant company's railway. Their charter of incorporation, under which their railway was constructed, being an Act of the Provincial Legislature.

By the Dominion Act (Local and Private Acts) 44 Vic., cap. 42, sec. 1, the work of the New Brunswick Railway Company is declared to be a work for the general advantage of Canada. Sec. 2 authorizes the extension of the line to the River St. Lawrence.

Sec. 6 enacts: "The Consolidated Railway Act, 1879, and any Act in amendment thereof passed during the present session of parliament, shall apply to the extension of the said railway hereby authorized, so far as it is applicable to the same; and the provisions of said Consolidated Railway Act, 1879, under the head of 'Tolls,' and any amendment thereof passed

1889.

LEVESQUE  
v.  
NEW BRUNSWICK RAILWAY CO.  
Wetmore, J.

1889.  
 LEVESQUE  
 v.  
 NEW BRUNSWICK RAIL-  
 WAY CO.  
 Wetmore, J.

during the present session of Parliament, shall apply to the company; and all enactments in the Acts of the Legislature of New Brunswick incorporating the company, or amending the Act incorporating said company inconsistent therewith, are repealed; but such repeal shall not affect any rights acquired or things validly done under and by virtue of said enactments."

Sec. 9 extended the provisions of sub-sec. 19, sec. 7, of the Consolidated Railway Act to the railway of the company already constructed, as well as to the parts to be constructed thereafter. This sub-section makes provision that changes may be made in the line of railway at any time for certain purposes.

Dominion Act 46 Vic., cap. 59, sec. 3 (Local and Private Acts), makes the provisions of the Consolidated Railway Act, 1879, apply to the company, so far as they are applicable to the undertaking, and are not inconsistent therewith. By Act 42 Vic., cap. 9, sec. 5, sub-sec. 4, the expression "the undertaking," is declared to mean the railway and works of whatever description by the special Act authorized to be executed.

This section seems only to apply to the construction of the road and other acts of the company for the completing of the work, etc. The words "applicable to the undertaking" do not seem to extend to damages arising from not erecting a fence on either side of the railway, which, though a duty imposed, is no part of the undertaking itself.

It would, to me, seem a very strained construction to extend the words "applicable to the undertaking" so as to afford protection for negligence or omission in respect to the erection of fences, which does not seem to be applicable to the undertaking, though it is a very proper protection to the public.

In *Browne v. The Brockville and Ottawa Railway Co.* (1), where the plaintiff sued defendants for injury caused to himself and his wagon by collision with their train at a railway crossing, owing to a neglect to sound the whistle or ring a bell on their approach as required by the statutes, and to the improper construction of the railroad being more above the level of the highway than the Act allowed; the jury having found for the plaintiff, it was held, that the injury, if arising from

either cause alleged, was sustained "by reason of the railway;" that it was not a case within the exception as to "continuation of damage;" and that the action having been brought more than six months from the accident, was therefore too late. Robinson, C. J., referring to the protective clause in English Railway Acts, in which the words are: "No action shall be brought for any thing done or omitted to be done in pursuance of this Act;" says: "It appears to us our statute is in its effect, as comprehensive as the English, though the forms of expression used are very different.

1889.

LEVESQUE  
v.  
NEW BRUNSWICK RAIL-  
WAY CO.  
Wetmore, J.

"As to the cause of damages arising from the improper or imperfect construction of the crossing, that does certainly come expressly within the words of our statute. It was a damage or injury sustained by reason of the railway; that is from its forming a wrongful obstruction to the highway—not being as nearly on a level with it as the law required. Clearly the action for that injury, should have been brought within six months."

"As to not giving the proper signals, that does not come expressly within the words of the clause, because it may be said that the damage was not sustained by reason of the railway, but rather by reason of the manner in which the carriages on the railway were driven; but we think the substance and effect, are the same in the one case as the other. 'By reason of the railway,' is a very comprehensive expression, and we think extends to an injury sustained on the railway by reason of the use made of it." And again, "All here, we think, must be referred to the unlawful act which occasioned the injury—we mean the unlawfully driving the train up to the station, without giving the proper signals."

In *McCallum v. Grand Trunk Railway Co.* (1), where the plaintiff sued defendants for having negligently allowed dry wood and leaves to accumulate on their track, which became ignited by their engine, and extended to plaintiff's land, destroying his trees, etc., it was held that this was an injury sustained "by reason of the railway," within sec. 83 of Consol. Stat. of Canada, cap. 66, and that plaintiff's suing more than

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(1) 30 U. C., Q. B. 122.

1889.

LEVESQUE  
v.  
NEW BRUNSWICK  
RAILWAY CO.  
Wetmore, J.

six months after such injury, was therefore barred. Mr. *Harrison, Q. C.*, in arguing for the defendants, contended that sec. 83 applied to things done in the construction of a railway, but not to negligence in the working and management of it. That the action was, in effect, for a breach of duty, a negligent omission of duty, not for an act committed, and if so, the damage was not applicable. It is the construction; not the use of the railway, which is intended by the words "by reason of the railway;" and negligence in the keeping of the track and use of the engine is not within it.

Morrison, J., in delivering judgment, said: "The alleged damage or injury complained of here, arose from fire or ashes escaping from the locomotive attached to the mail train while passing over the railway. Can it be said that such an injury was not occasioned or sustained by reason of the railway?" Referring to the judgment of Lord Cairns in *Hammersmith, &c., Railway Co. v. Brand* (1).

And again he said: "Our Legislature, no doubt, meant and intended that the words 'by reason of the railway' should include and apply to 'the living and active thing,' to the railway as a 'going and working concern,' and had in its mind the idea of its use as such. I therefore perfectly concur in the view taken by my brother Wilson at the trial, that the words 'by reason of the railway' mean by reason of the working, management or use of the railway." There was a rule absolute for a nonsuit. This judgment was affirmed on appeal (2). See also *Palmer v. Grand Junction Railway Co.* (3), and *Carpue v. London and Brighton Railway Co.* (4).

Under these decisions, it becomes important to examine the 27th sec. of our Act, with the 214th sec. of the English Act to see how far they differ.

The English Act is: No action shall be brought for anything done or omitted to be done in pursuance of the Act. Our Act is: All suits for indemnity for any damage by reason of the railway. Had our Act been, "For anything done or omitted to be done," the neglecting to erect and maintain fences, etc., required by sec. 14 would have been within the terms of the

(1) L. R. 4 H. L. 171.  
(2) 31 U. C. Q. B. 527.

(3) 4 M. & W. 749.  
(4) 5 Q. B. 747.

section; but I think they are very different. Robinson, C. J., in *Browne v. The Brockville and Ottawa Railway*, says: "It appears to us our statute is in effect as comprehensive as the English, though the forms of expression are very different." I think the learned Chief Justice must have meant his expression to apply only to the case then before the Court. The matter of fences is not mentioned in either of the cases quoted from the Upper Canada Reports, and whatever respect I entertain for the opinions of the learned Judges, I fail to see how they can help us in deciding the case before us.

It does seem to me that the fences which the company is required to erect, do not come within the meaning of the expression "the railway," which shall mean by the statute the railway and the works by the special Act authorized to be constructed; or within the meaning of the words, "the undertaking," which shall mean the railway and the works of whatever description by the special Act authorized to be executed. The fences are not *authorized* to be erected and maintained. They are *required* to be erected and maintained on each side of the land taken by the company for the railroad. There are any number of doings which are authorized, and to which the limitation of time for bringing the action is properly and strictly applicable. The railway can be a complete going concern without the fences being erected. The damage complained of is not for indemnity for any damage or injury sustained by reason of the railway; but it is for damage sustained by reason of the not erecting and maintaining the fences required by the statute on each side of the land taken by them for the railroad. It appears to me the matter of fences does not come within the 27th sec.; and therefore the plaintiff's verdict should not be interfered with.

SIR JOHN C. ALLEN, C. J. The plaintiff's principal claim in this case was for killing his horse, in consequence of the negligent construction of the defendants' railway; but he also claimed damages for cattle straying on his land by means of the defendants neglecting to fence their line of railway where it passed through his land.

The defendants were incorporated in this Province by Act

1889.

LEVESQUE

v.  
NEW BRUNSWICK RAILWAY CO.

Wetmore, J.

1889.  
 LEVESQUE  
 v.  
 NEW BRUNSWICK RAIL-  
 WAY CO.  
 Allen, C. J.

of Assembly 33 Vic., cap. 49, for the purpose of constructing a railway from Woodstock, in the County of Carleton, to Edmundston, in the County of Victoria.

The 14th sec. of the Act directed that the Company should erect and maintain substantial fences, not less than four feet in height, on each side of the land taken by them for the railroad where it passed through enclosed or improved lands.

In 1883, an Act was passed by the Dominion Parliament (46 Vic., cap. 59) to amend the Act of incorporation, by which it was declared that the provisions of the Consolidated Railway Act, 1879, should apply to the defendant company, so far as they were applicable to the undertaking, and were not inconsistent with the Act of incorporation and the Acts in amendment of it.

It was contended on behalf of the defendants at the trial (among other objections), that if the plaintiff ever had any right of action for killing his horse, it was barred by the 27th section of the Consolidated Railway Act, 42 Vic., cap. 9, the action not having been brought till more than six months after the accident.

That section declares that "All suits for indemnity for any damage or injury sustained by reason of the railway, shall be commenced within six months next after the time of such supposed damage sustained, or if there be a continuation of damage, within six months next after the doing or committing such damage ceases, and not afterwards; and the defendants may plead the general issue, and give this Act and the special Act, and the special matter in evidence at any trial to be had thereupon, and may prove that the same was done in pursuance of, and by the authority of this Act and the special Act." (The Railway Act, Rev. Stat. Can., cap. 109, sec. 27.)

Sec. 5 of the Act defines the meaning of the expression "The special Act."

In answer to this objection of the defendants, it was contended that, even admitting that railways were included in the classes of subjects assigned exclusively to the Dominion Parliament by "The British North America Act, 1867," the right to limit the time for bringing an action for breach of the



provisions of the Railway Act was not an incident to the right to legislate on the subject of railways, nor did it include the right to legislate on the subject of the pleadings and evidence in such action; these matters being "civil rights" in this Province, and exclusively within the jurisdiction of the Provincial Legislature by the 92nd section of "The British North America Act."

1889.  
LEVESQUE  
v.  
NEW BRUNSWICK RAILWAY CO.  
Allen, C. J.

I think that both those matters were incident to the right of the Dominion Parliament to legislate on the subject of railways. In *Valin v. Langlois* (1), it was held that the Dominion Parliament had the right to interfere with civil rights, when necessary for the purpose of legislating generally and effectually in relation to matters confided to that Parliament; and that the exclusive power of legislation given to the Provincial Legislature by the 92nd section of the British North America Act over procedure in civil matters, meant procedure in matters within the powers of the Provincial Legislature. That principle was also acted on in *The City of Fredericton v. The Queen* (2); and in *Crushing v. Dupuy* (3). In the last mentioned case the question arose under the Dominion Insolvent Act of 1875, the contention being that one of the provisions of the the Act was *ultra vires*, inasmuch as it interfered with "Property and Civil rights"—subjects which belonged exclusively to the Provincial Legislatures by "The British North America Act, 1867, sec. 92. But the Judicial Committee held otherwise; saying that "procedure must necessarily form an essential part of any law dealing with insolvency. It was therefore to be presumed, indeed it was a necessary implication, that the Imperial statute, in assigning to the Dominion Parliament the subjects of bankruptcy and insolvency, intended to confer on it legislative power to interfere with property and civil rights and procedure within the Provinces, so far as a general law relating to those subjects might affect them."

That principle of construction is equally applicable to the present case, where the question of procedure in an action against this railway is involved. In addition to the above authorities, the Dominion statute, 44 Vic. cap. 42 (Local and Private), may be referred to; the first section of which declares

(1) 3 Can. S. C. R. 1.

(2) 3 Can. S. C. R. 505.

(3) 5 App. Cas. 409.

1889  
 LEVESQUE  
 v.  
 NEW BRUNSWICK RAILWAY CO.  
 Allen, C. J.

that the work of The New Brunswick Railway Company is a work for the general advantage of Canada; and the 92nd section of The British North America Act, in defining the subjects which are exclusively within the powers of the Provincial Legislatures, excepts by paragraph 10: "Such works as, although wholly situate within the Province, are before or after their execution, declared by the Parliament of Canada, to be for the general advantage of Canada, or for the advantage of two or more of the Provinces."

I am of opinion, therefore, without considering the question of contributory negligence, or the objections to the declaration, that the plaintiff's right to claim for the loss of his horse is barred by the 27th section of the Railway Act. The effect of this section was considered in the case of *Anderson v. Canadian Pacific Railway Co.* (1), and it was held that the section did not apply to an action arising out of contract, but to actions for damages occasioned by the company in the execution of the powers given to enable them to maintain their railway. That judgment was appealed from (17 Ont. App. 480), and the Court differed in opinion—two of the Judges affirming the decision in the Court below, and two being of opinion that sec. 27 was *ultra vires*.

Another question was, whether the plaintiff was entitled to recover damages for cattle straying upon his land in consequence of the defendants having neglected to fence their railway.

The 14th section of their Act of incorporation, 33 Vic. cap. 49, passed in April, 1870, expressly directs that the company shall erect and maintain substantial fences on each side of the land taken by them for the railway, where it passes through improved lands. This provision was changed by the 16th sec. of The Consolidated Railway Act, 1879, which directs that, within six months after any lands have been taken for the use of a railway, the company shall, "if thereunto required by the proprietors of the adjoining lands," erect and maintain sufficient fences on each side of the railway; and also cattle guards at all road crossings, sufficient to prevent cattle and animals from getting on the railway. This enactment was continued by

the 13th section of "The Railway Act," (Rev. Stat. Can., cap. 109), which required the request to be in writing, and which came into force on the 1st March, 1887.

If the plaintiff's right to recover for the damage to his land by cattle is affected by either of the two last mentioned Acts, it is clear that he cannot recover, because he made no request to the defendants to erect the fences, the want of which he complains of. But the Dominion Act, 46 Vic. cap 59, directs that the provisions of "The Consolidated Railway Act, 1879," shall apply to the New Brunswick Railway Company, so far as they are applicable to the undertaking, and not inconsistent with the provisions of the special Acts of the company.

Now, the provisions in the 16th sec. of The Consolidated Railway Act, 1879, directing the company to erect fences on each side of the railway, if required to do so by the proprietors of the adjoining lands, is quite inconsistent with the directions in the 14th section of the defendants' Act of incorporation, which requires them absolutely to erect and maintain such fences where the railway passes through improved lands. In the one case, the duty to erect and maintain the fences is conditional, in the other, it is unconditional and imperative. I therefore think the defendants' duty in this particular is governed by the 14th section of the Act of incorporation, and not by the 16th section of The Consolidated Railway Act.

Then, assuming that it was the defendants' duty to erect the fences, the important question still remains, whether they are liable to an action at the suit of a person who has been damaged by their neglect to obey the direction of the statute.

In *Couch v. Steel* (1), the plaintiff, a seaman on board the defendant's ship, brought an action against him for neglecting to supply, and keep on board the ship, a proper supply of medicines, whereby the plaintiff's health suffered. The statute 7 & 8 Vic. cap. 112, made it the duty of shipowners to have such medicines on board, and imposed a penalty for each default; and it was held that the plaintiff, having sustained a private injury from the defendant's breach of the statutable duty, was entitled to recover damages. Lord Campbell, delivering the judgment of the Court, said: "Were it not for the penalty to

1889.  
LEVESQUE  
v.  
NEW BRUNSWICK RAILWAY CO.  
Allen, C. J.

1889.  
 LEVESQUE  
 v.  
 NEW BRUNSWICK RAIL-  
 WAY Co.  
 Allen, C. J.

which the owner of a ship is subjected for not supplying and keeping on board a supply of medicines, it seems clear that the action would be maintainable. The enactment provides a benefit for the seamen, and the defendant has violated this enactment, and thereby the plaintiff was deprived of that benefit, and his health was injured. The general rule is, that where a man has a temporal loss or damage by the wrong of another, he may have an action upon the case, to be repaired in damages. Com. Dig. 'Action upon the Case' (A). \* \* \* \* As far as the *public* wrong is concerned, there is no remedy but that prescribed by the Act of Parliament. There is, however, beyond the public wrong, a special and particular damage sustained by the plaintiff by reason of the breach of duty of the defendant, for which he has no remedy, unless an action on the case at his suit be maintainable: and the question is whether the penalty annexed to the offence concludes the plaintiff who has sustained a special and particular damage, as well as the public, though no part of the penalty is payable to him. If the performance of a new duty created by Act of Parliament, is enforced by a penalty recoverable by the party grieved by the non-performance, there is no other remedy than that given by the Act, either for the public or private wrong; but by the penalty given in the Act now in question, compensation for private special damage seems not to have been contemplated. The penalty is recoverable in case of a breach of the public duty, though no damage may actually have been sustained by anybody; and no authority has been cited to us nor are we aware of any in which it has been held that in such a case as the present, the common law right to maintain an action in respect of a special damage resulting from the breach of a public duty (whether such duty exists at common law, or is created by statute), is taken away by reason of a penalty, recoverable by a common informer, being annexed as a punishment for the non-performance of the public duty."

I know that case has been questioned in *Atkinson v. Newcastle Waterworks Co.* (1), where the Act incorporating the company required them to fix and maintain fire-plugs to supply the town commissioners with a supply of water for

certain public purposes; and to keep the pipes to which fire-plugs were fixed, charged with water at a certain pressure, and to allow all persons to use the same for extinguishing fire, without compensation. A penalty was imposed for the neglect of each of the above duties, half of which might be awarded to the informer. An action was brought against the company to recover damages for not keeping their pipes charged with water as required by the Act, whereby the plaintiff's house was burnt; and it was held that the action would not lie. The Lord Chancellor, referring to the case of *Couch v. Steel*, said: "I must venture, with great respect to the learned Judges who decided that case, to express grave doubts whether the authorities cited by Lord Campbell justify the broad general proposition that appears to have been there laid down — that wherever a statutory duty is created, any person who can shew that he has sustained injuries from the non-performance of that duty, can bring an action for damages against the person on whom the duty is imposed. I cannot but think that that must, to a great extent, depend on the purview of the Legislature in the particular statute, and the language which they have there employed, and more especially when, as here, the Act with which the Court have to deal is not an Act of public and general policy, but is rather in the nature of a private legislative bargain with a body of undertakers as to the manner in which they will keep up certain public works." Cockburn, C. J., said: "The Act which we have now before us does not by implication give to persons who may be injured by the breach of the duties thereby imposed, any remedy over and above those which it gives in express terms. If, therefore, any person is injured by a breach of such duty, he must have recourse to the statutory remedy, and cannot maintain an action for damages." And Brett, L. J., added that on the true construction of the statute affecting that case, it was plainly the intention of the Legislature that the only remedy for such a breach of duty as was complained of there, should be the recovery of the penalty. That circumstance, together with the fact that the company was bound to supply gratuitously an unlimited quantity of water for the purpose of extinguishing fires, evidently influenced the Court in coming

1889.

LEVESQUE  
v.  
NEW BRUNSWICK RAIL-  
WAY CO.

Allen, C. J.

1889.

LEVESQUE  
v.  
NEW BRUNSWICK  
RAILWAY CO.

Allen, C. J.

to the conclusion that the Legislature intended that the only remedy for a breach of duty by the company was that provided by the statute.

That was also the principle on which *Vallance v. Falle* (1) was decided.

The case of *Blakslee v. St. John Water Co.* (2) was similar in its circumstances to *Atkinson v. Newcastle Waterworks Co.*, except in the fact that there was no pecuniary penalty prescribed for a breach of any of the duties imposed on the company. The action was brought for negligently omitting to keep a supply of water in the pipes, in consequence of which the plaintiff's house was burnt. The case was argued with very great ability by the plaintiff's counsel upon the implied liability of the defendants, on the construction of the statutes under which they acted; but the Court held that the only duty imposed on the defendants by the statute was, to establish fire-plugs for supplying water when in the pipes, and to keep those plugs in serviceable order, and that the liability of the company did not extend beyond that.

I think there is nothing in that case opposed to the plaintiff's contention here, that the defendants were bound by their Act of incorporation to keep up the fences on each side of the railway, and that through their neglect to do so he has sustained damage. There, the decision of the Court was, that the Water Company had done all that the Act required them to do.

The case of *Hammond v. The Vestry of St. Pancras* (3), was also referred to by the defendants' counsel, to shew that they could not be liable without negligence. There the action was brought for damages sustained by the plaintiff in consequence of the defendant not cleansing a sewer which they were bound by statute to cleanse. The jury found that the obstruction to the drain was unknown to the defendants, and could not have been known to them by the exercise of reasonable care. The Court held that the statute did not impose an absolute duty on the defendants to keep the sewer cleansed, and that they were not liable unless they were guilty of negligence. In the present case, the Act does impose in the clearest language, an absolute duty on the defendants to erect and maintain the

(1) 13 Q. B. D. 109.

(2) 1 All. 689.

(3) L. R. 9 C. P. 316.

fences ; and in that respect it is distinguishable from the case of the Vestry of St. Pancras.

1889.

The exception taken by the Court in the the case of *Atkinson v. Newcastle Waterworks Co.*, to the judgment of Lord Campbell in *Couch v. Steel*, was, that he laid down the rule too broadly as to the right of a person injured by the non-performance of a statutory duty, to bring an action against the person on whom the duty was imposed, in cases where the statute imposed a penalty for the breach of duty—as it did in that case. But there is no penalty imposed, either in the defendants' Act of incorporation, 33 Vic. cap. 49, or in The Consolidated Railway Act, 1879 ; or in chapter 109 of the Revised Statutes, for the neglect of the company to erect and maintain fences on each side of the railway ; and the plaintiff is entirely without remedy for the injury to his property by the defendants' neglect, unless he can bring an action. Even in the case of *Blakslee v. The St. John Water Co.*, there is nothing from which it can be inferred that, in the opinion of the Court, the action could not have been maintained if the Act had required the defendants to keep a supply of water in their pipes at all times, and they had neglected to do so.

LEVESQUE  
v.  
NEW BRUNSWICK RAILWAY CO.  
Allen, C. J.

In *Walker v. City of Halifax* (1), it was held by the Supreme Court of Nova Scotia, that an action would lie by a person who suffered damage through the neglect of the defendants to repair the streets, though they would be liable to an indictment for non-repair.

I am, therefore, of opinion that the action is maintainable for the injury sustained by the plaintiff from cattle straying on his land, by reason of the defendants having neglected to fence the railway ; but that he can only recover for the damage sustained during the six months preceeding the bringing of this action ; and, as that has been agreed upon at \$10, the verdict should be reduced to that sum on the first count of the declaration, and be entered for the defendants on the other counts.

FRASER, J., agreed with the majority of the Court.

1889.

PALMER, J., not having heard the argument, took no part.

LEVESQUE  
v.  
NEW BRUNSWICK RAIL-  
WAY CO.

*Verdict reduced to \$10 on first count, and  
verdict for defendants on other counts.*

1889.

CLARK v. BAIRD.

May 7.

*Solicitor and client — Action for negligence in conducting a suit — Retainer — Pleading.*

In an action against a solicitor for negligence in conducting a suit, it is sufficient to state in the declaration that he was retained as a solicitor to conduct a suit in equity: the reasonable intendment of the words being, that the suit was in the Court of Equity of this Province, and that the defendant was a solicitor of that Court. (PALMER, J., dissenting).

In such an action, it is sufficient in the declaration to allege that the defendant was retained as a solicitor, without stating that he was retained for reward.

A count alleged that the plaintiff at the defendant's request retained and employed him as a solicitor to commence and conduct a certain suit, yet the defendant, although he accepted the retainer, "colluded and wrongfully combined with the opposite party's counsel in the suit to prevent the plaintiff from recovering," and entered into an agreement by which the plaintiff was put to great loss:

*Held*, that the count stated a good cause of action.

**DECLARATION:** James Clark, by &c., his attorney, sues George F. Baird, for that the plaintiff at the defendant's request, retained and employed him, as and being a solicitor, to commence and conduct a certain suit in Equity, by and at the suit of the plaintiff and Edward C. Elkin against George A. Schotfield and William E. Collier, to recover the value of certain shares of the schooner "Isaac Burpee," and for the taking an account of all the moneys received by George F. Burpee and Charles E. Burpee, and of all moneys disbursed by them as ships husbands or managing owners of the schooner "Isaac Burpee," and for other purposes mentioned in the bill in said suit; and in consideration thereof the defendant promised the plaintiff that he would use due and proper care, skill and diligence in and about the bringing and conducting the said suit; yet the defendant, although he accepted the said retainer and brought the said suit, did not use due or proper care, skill or



1889.

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CLARK  
v.  
BAIRD.

diligence in and about the conducting the said suit but conducted the said suit in a careless, unskilful and improper manner, in this, that he did not proceed with the hearing of the said suit according to the rules and practices of the Court, and as and when it was his duty so to do; whereby the plaintiff was put to great loss, and was compelled to pay out a large sum of money as costs to defendants in the said suit, in order to prevent his suit and bill from being dismissed, and thereby also incurred other expenses in prosecuting the said suit, and was and is otherwise injured.

2. And for that the plaintiff, at the defendant's request, retained and employed him, as and being a solicitor, to commence and conduct a certain other suit in Equity, by and at the suit of &c., (as in the first count); yet the defendant, although he accepted the said retainer and brought the said suit, did not use due or proper care, skill or diligence in and about the conducting the said suit, but conducted the same in a careless, unskilful and improper manner, in this, that he colluded and wrongfully and improperly combined with one Charles A. Palmer, the counsel in the suit for the defendants, and with one John P. McIntyre, the agent of the defendants, with a view to defeat the plaintiff in the suit, and to prevent him from recovering in the same, and with the said Charles A. Palmer, and with the connivance of the defendants, bought the said shares in the said schooner contrary to his, the said defendant's duty to the plaintiff; whereby the plaintiff's proceeding in said suit became futile and unavailing, and the plaintiff did not succeed, and was defeated therein and became subject to great costs and expenses which he was compelled to pay to defendants, and thereby was and is otherwise injured.

3. And for that the plaintiff at the defendant's request retained and employed him, the said defendant, as and being a solicitor, to commence and conduct a certain other suit in Equity, by and at the suit of the said plaintiff against, &c.; yet the defendant, although he accepted the said retainer and agreed to bring the last mentioned suit, did not bring said last mentioned suit in the name of the said plaintiff as plaintiff therein and did not use due and proper skill or diligence in bringing said last mentioned suit, in this that he improperly

1889. joined the name of Edward C. Elkin with the name of the  
CLARK said plaintiff and brought said last mentioned suit in the name  
v. of James Clark and Edward C. Elkin, as plaintiffs therein,  
BAIRD. against the said George A. Schofield and William E. Collier  
instead of in the name of James Clark alone, against said  
George A. Schofield and William E. Collier; whereby the said  
plaintiff was put to great loss and was compelled to pay out a  
large sum of money as costs to the defendants in said last  
mentioned suit, to have his said bill amended by striking out  
the name of the said Edward C. Elkin as one of the plaintiffs  
in said last mentioned suit; and whereby the said plaintiff  
also incurred other expenses and costs, and was and is other-  
wise injured.

And the plaintiff claims five thousand dollars.

The defendant demurred to the declaration upon the follow-  
ing grounds: 1. No consideration is stated in any of the  
counts for the alleged contract or retainer. 2. It is not stated  
or alleged that the defendant was an attorney or solicitor of  
what, or any Court. 3. It is not stated that the alleged suits  
were brought in any Court. 4. No allegation that the defen-  
dant was retained for reward. 5. No allegation denying a soli-  
citor's general and implied authority to settle or otherwise dis-  
pose of suits. 6. That the alleged purchase of the shares of  
the vessel, as stated in the second count, discloses no ground of  
action. 7. That the alleged purchase of the shares of the  
vessel is no breach of a solicitor's duty to his client.

February 6, 1889. *L. A. Currey*, in support of the demurrer.  
The declaration is bad, inasmuch as it does not state that the  
defendant is an attorney or solicitor of this or any other Court.  
The allegation that the plaintiff employed him "as and being  
a solicitor," is not sufficient. The form of a declaration in an  
action against an attorney for negligence, given in *Bullen and  
Leake*, p. 83, states of what Court the defendant is an attorney.  
In the case of *Frankland v. Cole* (1), which is referred to as  
an illustration of a count for negligently conducting a suit in  
Chancery, there does not appear to have been any objection to  
the declaration in this respect. The question in dispute was

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(1) 2 C. & J. 590.

as to the conduct of the solicitor, and the reporter does not profess to give the declaration at full length, or in the words of the pleader. The allegation that he was retained to bring a suit in Equity is not of itself a statement that the suit was to be commenced in any recognized Court in this Province. From the expression "a suit in Equity," it cannot be inferred that the Supreme Court in Equity is meant, or that the defendant is a solicitor in the Supreme Court in Equity in this Province. Neither does the declaration allege that the defendant was retained for reward, which is necessary in such an action as the present. *Dartnall v. Howard* (1); *Cavilland v. Yale* (2). The statement that the defendant had not proceeded with the hearing of the suit according to the rules and practice of the Court is not a sufficient allegation of neglect of duty. He may have deemed it more advantageous to his client's interests to delay or discontinue the suit. The facts stated should fully disclose the duty, a breach of which is complained of. *Seymour v. Maddox* (3).

As to the second count, it does not state any facts on which to base an action against an attorney. The mere buying of the shares of the vessel does not deprive the plaintiff of any rights under his suit. In *Purves v. Landell* (4), it was held that a declaration against an attorney to recover damages for loss occasioned by his management of a cause must charge gross ignorance or gross neglect, or must, at least, contain allegations of facts from which the inference is inevitable that the defendant has been guilty of one or the other. Here, the facts alleged do not show either the one or the other; nor can collusion or fraud be inferred from the facts stated. As to collusion, see *Hickson v. Lombard* (5), and *Chapman v. Chapman* (6).

*W. Pugsley, contra.* In an action against an attorney or solicitor for negligence in conducting a suit, it is sufficient to allege that he was retained as attorney or solicitor, without stating that it was for reward. In *Dartnall v. Howard*, which has been referred to, there was no allegation that the defendant was an attorney, and expressly on that ground it was held

1889.

CLARK  
v.  
BAIRD.

(1) 4 B. & C. 345.  
(2) 2 U. S. Dig. 368.

(3) 16 Q. B. 328.  
(4) 12 Cl. & F. 91.

(5) L. R. 1 H. L. 324.  
(6) L. R. 9 Eq. 276.

1889. that a reward should be stated. In *Bourne v. Diggles* (1),  
CLARK however, where the defendant was described as an attorney,  
v. the Court held that was sufficient, and that he was to have  
BAIRD. any reward need not be stated. The retainer carries with it  
the obligation to pay, and that the employment is for reward.  
The table of fees (Consol. Stat., cap. 119) recognizes the  
retainer as taxable. The form of declaration adopted by the  
attorney in this case, is the one laid down in Bull. & Leake,  
83, as being the proper form for action against an attorney or  
solicitor for neglect in conducting a suit in Chancery. The  
allegation that the plaintiff retained the defendant "as and  
being a solicitor" can only have one meaning, namely, that he  
was retained as a solicitor and as an officer of the Court of  
Equity. A suit in Equity means a suit in a Court of Equity.  
The Legislature has recognized such a use of the term Equity.  
For instance, in sec. 16 of cap. 49, Consol. Stat., the expression  
"all causes in Equity" is used in referring to causes in the  
Supreme Court in Equity. The words "retained to conduct a  
suit in Equity," if used in any proceedings in this Court, can  
fairly be construed to mean, retained to conduct a suit in the  
Supreme Court in Equity of this Province. The expression  
"a suit in Equity" has a well recognized meaning in our  
Courts.

As to the second count, it clearly states a cause of action.

*L. A. Currey*, in reply.

*Cur. adv. vult.*

The following judgments were now delivered :

SIR JOHN C. ALLEN, C. J. I have had a good deal of doubt  
whether the declaration in this case is not defective in omitting  
to state that the defendant was an attorney or solicitor of this  
Court at the time the plaintiff retained him. The precedents  
of declarations in actions against attorneys for negligence,  
both in Chitty, and in Bullen & Leake, state either, generally,  
that the defendant was an attorney of the Court of our Lord  
the King, or, that he was an attorney of some particular Court.

The question is, whether this declaration, stating that "the

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(1) 2 Chit. R. 511.

plaintiff retained the defendant, as and being a solicitor, to commence and conduct a suit in Equity, at the suit of the plaintiff, against," &c., is certain to a common intent; that is, whether it is clear enough according to reasonable intendment or construction, though not worded with absolute precision, that it can be construed to mean that the defendant was a solicitor of this Court. Steph. Pl. 7th ed. 339.

We know that there is a Court of Equity in this Province, established by law; but we have no knowledge of a Court of Equity elsewhere which we are bound to notice, so far as I am aware. Are we not then justified in holding, by reasonable intendment, that the Court of Equity in which the defendant was retained by the plaintiff to commence the suit, was the Court of Equity in this Province? If we are so justified, then I think it follows that the word "solicitor" means a solicitor of that Court, because no other solicitor would have right to commence and prosecute a suit in the Court of Equity of this Province; and therefore that the statement in the declaration of the defendant's retainer is sufficient.

In the note in 2 Chit. Pl. 6th ed. 238, it is said that it is not necessary to shew of what Court the defendant was an attorney; and that it is best merely to state that the plaintiff retained the defendant as an attorney. The precedent to which this referred, alleged that the defendant was an attorney of the King's Court.

For this, the cases of *Green v. Jackson* (1) and *Bourne v. Diggles* (2) are cited. In the former of those cases, the declaration stated that the defendant was an attorney of the Court of Sessions of the County of Chester, and that the plaintiff retained and employed him. Objection was taken, that there was no evidence of the defendant being an attorney as stated. Lord Kenyon said that the plaintiff had encumbered himself with too much proof. If he had stated generally, that the defendant was an attorney, the evidence would have been sufficient; but it did not prove him to be an attorney of that Court.

In *Bourne v. Diggles* (2)—referring to *Green v. Jackson*—it

1889.

CLARK

v.  
BAIRD.

Allen, C. J.

(1) Peake's R. 311.

(2) 2 Chit. R. 311.

1889.

CLARK  
v.  
BAIRD.

Allen, C. J.

was held that if the declaration alleged the defendant to be an attorney of a particular Court, the plaintiff must prove it.

In *Frankland v. Cole* (1), where the declaration is professed to be set out, the statement of the retainer of the defendant is quite as general as in the declaration in this case. It states that the plaintiff had employed one S., as his solicitor to prosecute a suit in the Court of Chancery. It is true that no question was raised about the declaration in that case, but it is referred to in Bull. & Leake, as a proper form.

Admitting the defendant's objection to be good, all that the declaration need have stated on this point, was that the defendant was a solicitor of this Court, and that the plaintiff retained him to commence and prosecute a suit in the Court of Equity of this Province. It would have saved both time and expense if the plaintiff's attorney had amended the declaration when these objections were pointed out to him by the demurrer.

I think there is nothing in the objection that the declaration should have stated that the defendant was retained for reward. It states that he was retained "as and being a solicitor." In *Bourne v. Diggles* (*supra*), where a similar objection was taken, Lord Ellenborough asked if it was not stated that the defendant was employed as an attorney; and on its being answered that defendant was alleged to be retained, &c., but not as an attorney; his lordship said then that must mean that he was retained as an attorney, and the Court would take judicial notice that he would not act without reward.

In *Dartnall v. Howard* (2), the declaration was held bad because it did not state that the defendant was employed in the character of an attorney, so as to make it his duty to do the act which he was charged with neglecting. Here, it is alleged that the defendant was employed as a solicitor.

The fifth ground of demurrer is not sustainable. There is nothing in either of the counts of the declaration charging the defendant with wrongfully settling the suit, unless that charge can be gathered from the second count, which states that he wrongfully colluded with certain persons to defeat the suit, and wrongfully purchased the shares in the schooner, whereby

(1) 2 C. &amp; J. 590.

(2) 4 B. &amp; C. 345.

the proceedings became futile, and the plaintiff was compelled to pay costs. If this is the count to which the fifth ground of demurrer is intended to apply, it sets up what may, perhaps, be matter of defence, but it is not a ground of demurrer.

I think the second count of the declaration does state a cause of action.

WETMORE and FRASER, JJ., agreed with the learned Chief Justice.

TUCK, J. This is a demurrer to a declaration. The action against the defendant is for breach of duty as plaintiff's solicitor, retained and employed to commence and conduct a suit in Equity at the suit of the plaintiff and Edward C. Elkin, against George A. Schofield and William E. Collier, to recover the value of certain shares of the schooner "Isaac Burpee," and for taking an account of all moneys received by George F. Burpee and Charles E. Burpee, as managing owners of the schooner "Isaac Burpee."

In the first count, the plaintiff complains that the defendant conducted the suit in a careless, unskilful and improper manner. In the second count, the complaint is that the defendant colluded with Charles A. Palmer to buy the shares in the schooner "Isaac Burpee," contrary to the defendant's duty, and whereby the plaintiff's proceedings in the suit became futile; and in the third count, the plaintiff alleges that he employed the defendant to bring a suit in plaintiff's name alone, whereas the defendant joined the name of Edward C. Elkin with plaintiff in the suit, and thereby caused him great loss.

Several points were taken at the argument to sustain the demurrer. It is necessary to consider only those which are important to the proper decision of the case. In Bull. & Leake p. 83, a form of declaration is given against an attorney for negligence in conducting an action at the suit of the plaintiff. The commencement of the declaration so given is: "That in consideration that the plaintiff retained the defendant as being an attorney of the Court of ———, to conduct an action in that Court at the suit of the plaintiff against G. H. for the recovery of money," etc.

1889.

CLARK  
v.  
BAIRD.

Allen, C. J.

1889.

CLARK

v.

BAIRD.

Tuck, J.

In *Frankland v. Cole* (1), the reporter professes to give a copy of the declaration in an action against a solicitor for negligently conducting a suit in Chancery. This case is cited in Bull. & Leake for a form of declaration in that kind of suit, and is likely the form by which the pleader was guided in framing the first and third counts of the declaration in this suit. The report of *Frankland v. Cole* begins in this way: "The first count of the declaration stated that the plaintiff had employed one H. R. Sylvester as his solicitor, to institute and prosecute a suit in the Court of Chancery, for the plaintiff and his wife, against certain defendants therein named, for the purpose of establishing the will of one Francis Lucas, and for carrying the trusts thereof into execution, and for other purposes." This differs from the form given in Bullen & Leake, inasmuch as the Court of which he was a solicitor is not stated. It may be more artistic to name the Court, but it does not at all follow that the count is demurrable because the Court is not named. In fact, the fair conclusion is, if Bullen & Leake is to be taken as an authority (and no one doubts its high standard as a text book), that either form of declaration is good. In this Court, the person who conducts a suit on the common law side is invariably called the plaintiff's or defendant's attorney, and if on the Equity side, he is called the plaintiff's or defendant's solicitor, as the case may be. In ordinary language, such a person is spoken of as being a solicitor in Equity proceedings, and an attorney in proceedings at law. No one, therefore, it seems to me, can be misled, or have any doubt as to what is meant when it is alleged that the plaintiff retained and employed him, as and being a solicitor, to commence and conduct a certain suit in Equity. It means, and can mean nothing else, when the action is brought in one of the Courts of this country, that the defendant is a solicitor of the Supreme Court in Equity, and had been retained to commence a suit in that Court. When it is alleged that the plaintiff retained the defendant, that is a sufficient statement of consideration. In a solicitor's bill of costs retainer is one of the taxable items, and the word in law, when applied to an attorney, has a well

(1) 2 C. &amp; J. 590.



known and recognized meaning, and in such case imports that he received a reward.

In *Bourne v. Diggles* (1), it was held that in action against an attorney for non-feazance, in not looking sufficiently into a title, it is sufficient to state that he was retained as attorney, without stating the consideration. Lord Ellenborough, C. J., observed that the declaration alleged that the plaintiff retained the defendant, and that could not have been unless the defendant had accepted the retainer. The very retainer was an employment, and could not be said to be without a consideration.

The allegation is positive, that the defendant was retained to commence a suit in Equity, which can only mean the Supreme Court in Equity, and that he accepted the retainer and brought the suit.

The word "retained," in a declaration, means employed for reward, and it is not necessary to use the words, "retained for certain reward in that behalf." The omission of such words does not make a declaration demurrable.

The distinction between this case and *Dartnall v. Howard* (1) is that there Abbott, C. J., held the count to be bad because the defendants were not alleged to be attorneys, and therefore any duty that would arise from that character could not be attributed to or imposed on them under the declaration. The word "retained," he says, "by no means imports that they were attorneys, because it is applicable to any other person who is engaged by any other person as his master or his employer." Here, on the contrary, it is alleged that the plaintiff retained the defendant as and being a solicitor, to commence a suit in Equity; a very different case from *Dartnall v. Howard*.

The declaration is good, without denying the solicitor's general and implied authority to settle or otherwise dispose of suits. In the first and third counts of this declaration there are facts stated which shew that it was the defendant's duty to use proper skill, care and diligence in the conduct of the suit, for a breach of which he would be liable in this action. The breach is of a duty, which arises from the relation between the parties and from the facts stated. For instance, it

1889.

CLARK  
v.  
BAIRD.

Tuck, J.

(1) 2 Chit. 311.

(2) 4 B. &amp; C. 345.

1889.

CLARK  
v.  
BAIRD.Tuck, J.  
—

is alleged that the defendant did not proceed with the hearing of the suit according to the practice of the Court, whereby the plaintiff was put to loss, and compelled to pay a large sum of money.

The second count differs from the other two, in charging that the defendant colluded and improperly combined with one Charles A. Palmer, the counsel for the defendant in the original suit, to prevent the plaintiff from recovering in the suit; and, together with Charles A. Palmer, and with the connivance of the defendant, bought the shares in the schooner, contrary to the defendant's duty to the plaintiff, etc. It seems to me that the statement of fraud here is sufficiently clear to entitle the plaintiff to maintain his action. The plaintiff charged the defendant with fraud which defeated the suit. The facts stated in this count are ample to maintain the action.

I think that the declaration is good, and that judgment ought to be given for the plaintiff on the demurrer.

PALMER, J. The declaration in this case contains three counts. The first and last are evidently drawn with the view of claiming against the defendant, that he did not, as a solicitor of the Supreme Court in Equity, properly conduct a proceeding therein for the plaintiff, by which the suit was lost.

The second count is for the defendant accepting a retainer and not properly proceeding for the plaintiff, that he colluded with other persons to defraud the plaintiff, and entered into an arrangement with them by which the plaintiff was defrauded.

It is apparent that there is no cause of action set out in the first or last counts, except the one that would arise from the duty that a solicitor of this Court owes to his client, and in such a case it is apparent that the declaration must show that the defendant was such solicitor, and that the proceedings complained of were such as are usually carried on by such solicitor. These counts contain neither; for although they both allege that he was retained as solicitor, yet they do not state of what Court he was a solicitor. Consistent with this allegation he may not have been a solicitor of any Court at all, and yet have accepted a retainer as solicitor, and if the declaration merely alleged that he was a solicitor, without stating that he

was a solicitor of this Court, consistent with that he might have been a solicitor of any Court, either in England or in the United States, or any other country. And, as by the rules of pleading the language must be taken most strongly against the party pleading, it is clear to my mind, that in order to support such a count, it should, with reasonable certainty, allege that he was a solicitor of this Court.

1889.  
CLARK  
v.  
BAIRD.  
—  
Palmer, J.  
—

If this could be got over, I do not think there is any allegation that the proceeding taken by the defendant, was in any Court in this Province. The allegation is that it is a proceeding in Equity. Consistent with that, the proceeding might have been in a Court in the United States, or in Ontario, or in England. This Court cannot take judicial notice of what is the law with regard to the duty or the duties of solicitors in any of these countries. I am the more disposed to come to this conclusion, because I do not think it desirable that pleaders should depart from the well settled forms of pleading.

With regard to the second count, although very peculiar in its form, I think it shows a good cause of action. I think, if any person as the agent of another, accepted employment from his principal and entered upon the matter which he was employed to do, and he deliberately commits a fraud upon his principal, by which that principal is injured, it is a good cause of action, and this, I think, is sufficiently set out in the second count.

KING, J., not having heard the argument, took no part.

*Judgment for plaintiff on the demurrer.*

1889. **OVERSEERS OF THE POOR FOR THE PARISH OF MONCTON V.  
OVERSEERS OF THE POOR FOR THE FRENCH INHABITANTS  
OF MONCTON.**

October 18.

*Overseers of the Poor—Relief of French poor—Right of Action for  
—Consol. Stat. cap. 99 sec. 67, and cap. 102 sec. 3.*

The overseers of the poor in a Parish in which overseers for the French inhabitants have also been elected under Consol. Stat. cap. 99 sec. 67, cannot, under cap. 102 sec. 3, recover from the latter overseers for relief provided to a French pauper in that Parish.

This was an application on behalf of the defendants, the Overseers of the poor for the French inhabitants of the Parish of Moncton, to review a judgment against them in a Magistrate's Court in an action brought to recover the amount of relief furnished by the plaintiffs, the Overseers of the poor for the Parish of Moncton, to one of the French paupers of the same Parish.

The case was referred to the Court by His Honor Mr. Justice Fraser, to whom the application for an order for review had been made.

October 3, 1889. *P. A. Landry, Q. C.*, for the defendants. The defendants are appointed under the authority of Consol. Stat. cap. 99, sec. 67, and their powers and duties are laid down in secs. 3, 4 and 5 of cap. 101, Consol. Stat. Sec. 3 of cap. 102, Consol. Stat., providing for the recovery of relief furnished by the Overseers of the poor of one Parish to the poor who have settlement in another Parish, from the Overseers of the poor of latter Parish, does not apply to the present case. That provision applies to Overseers of different Parishes. Overseers have a right to the remedy thus provided for, only in case the relief is furnished a person not belonging to their Parish, and only until he shall be removed to the place of his lawful settlement. Here, the relief sought to be recovered for was supplied to a person within his proper district. If the plaintiffs have any remedy it must be under sec. 11 of cap. 102, and they have not brought themselves within the provisions of

that section. No proper notice was given the defendants, and the expenses were not laid before the County Council, as there provided for.

1889.

OVERSEERS OF  
THE POOR  
FOR THE  
PARISH OF  
MONCTON.  
v.  
OVERSEERS OF  
THE POOR  
FOR THE  
FRENCH IN-  
HABITANTS OF  
MONCTON.

*Geo. F. Gregory*, for the plaintiffs. The plaintiffs and the defendants are in law to be treated as Overseers of different Parishes. Sec. 13 of cap. 102, defines "Parish" to mean the district in which assessments for the support of the poor are authorized to be made. Under secs. 3, 4 and 5 of cap. 101, provision is made for separate assessments by the defendants. There may be two districts, controlled by separate corporations in the same Parish, for different paupers. In such a case, the Overseers of the several classes are to be treated in all respects as Overseers of the poor for different parishes. Sec. 11 of cap 102 only applies to the case of a person incurring necessary expense for the relief of a pauper. (ALLEN, C. J., By the chapter of Terms, "Person" may include any body corporate). Sec. 3 of cap. 102, having provided a remedy for overseers as a corporate body, furnishing relief, sec. 11, relating to expenses incurred by a person, must be held to refer to a person only, and not to a corporation.

*Cur. adv. vult.*

On a later day in the Term, the Chief Justice stated that the Court were of opinion that the right of action as given by sec. 3 of cap. 102 did not apply to the different Overseers of the same Parish, authorized by cap. 99, sec. 67; and therefore that judgment should be entered for the defendants.

*Judgment accordingly.*

1890. RYAN, PETITIONER, AND TURNER AND LEWIS, RESPONDENTS.

May 3.

*Controverted Elections Act (Consol. Stat., cap. 5)—Form of Petition—Service on Respondents.—How return should be made.*

A petition under The Controverted Elections Act (Consol. Stat. cap. 5), need not shew on its face that it was presented within the time limited by the Act; it is sufficient if Form (A), prescribed by the Act, is adopted.

It is not necessary that the return of the service of the duplicate petition should be made through the office of the sheriff of the county in which it is served.

April 19, 1890. *Powell* moved to rescind an order made by His Honor Mr. Justice Tuck dismissing an application to strike off the files of the Court an Election petition filed against the respondents under the Controverted Elections Act (Consol. Stat., cap. 5). The objections were: 1. That the petition did not shew on its face that it was filed within 21 days after the return of the respondents had been made to the clerk of the Crown in Chancery. 2. That the petition was not returned through the office of the sheriff of the county.

He contended that, it being one of the requirements to be observed in the presentation of an election petition that it should be presented within 21 days after the return, it should appear on the face of the petition that it was presented within the time limited by the statute. The form given in the Act was only intended as a guide in drawing up the petition, and the requirements of the Act itself must be observed. As to the second objection, sec. 6 of the Act declared that the petition should be served on the respondent, by a service of a copy of the same, and "in all respects as nearly as might be in the manner in which a writ of summons was served." That as a writ of summons, whether served by the sheriff or by any other person, must be returned through the office of the sheriff of the county in which the writ has been served, the same practice must be followed in the service of an Election petition.

*Cur. adv. vult.*

On a later day in Term, the Chief Justice, in delivering the

opinion of the Court (Sir JOHN C. ALLEN, C. J., and WETMORE, J), refusing the application, stated that inasmuch as the statute laid down a form of petition, it was not necessary that the petition shew on its face that it had been filed within the time limited by the statute; but that if it had not been so filed, the proper course would be to apply to have it struck from the files of the Court on that ground. The Court also thought that it need not be returned through the office of the sheriff.

1890.

RYAN  
v.  
TURNER AND  
LEWIS.

*Application refused.*

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NEILSON v. NEILSON.

1888.

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October 19.

*Judgment by confession—Motion to set aside as fraudulent—Father and son—Application by judgment creditor—Failure to establish fraud—Delay.*

A summary application by a judgment creditor of the defendant, to set aside a judgment by confession given by the defendant (the plaintiff's father), was refused—the applicant having failed to establish fraud and collusion between father and son.

Per PALMER, J., that it would have been more satisfactory to try the question of fraud by an issue.

Remarks on the delay in making the application.

In Easter Term, 1887, on motion of *Geo. F. Gregory* on behalf of Jabez B. Snowball, a judgment creditor of the defendant, a rule *nisi* was granted calling upon the plaintiff, James Neilson, junior, to shew cause why the judgment signed by him against the defendant, James Neilson, senior, should not be set aside on the ground of collusion between the plaintiff and defendant, and fraud as against the applicant.

February 11, 1888. *J. A. VanWart* shewed cause. The affidavits shew that the defendant was indebted to the plaintiff in some amount at the time the *cognovit* was given, and the judgment should stand for that amount, at least. The onus is cast upon the applicant to make out clearly the intention to delay and defraud other creditors. Even if a question arises as to the amount due the plaintiff, the Court will not direct an issue unless the case is tainted with fraud.

1898.

NEILSON  
v.  
NEILSON.

*Geo. F. Gregory*, in support of the rule. Though an amount is justly due, if a judgment be taken for more than is due, it vitiates the whole judgment unless it is clearly explained that there has been an error. The facts presented by the affidavits having cast a suspicion upon the *bona fides* of the judgment, the plaintiff is bound to shew that the judgment is an honest one. The absence of fraud must be established to the satisfaction of the Court. If it is left uncertain, then it is the duty of the Court to send the matter to an issue. *Biggs v. Eagles* (1); *Hickson v. Loban* (2); *Muirhead v. Loban* (3); *Record v. Record* (4); *Secord v. Green* (5); *Martin v. Martin* (6); *Harrod v. Benton* (7); *Douglass v. Ward* (8); *Commercial Bank v. Wilson* (9).

*Cur. adv. vult.*

The following judgments were now delivered :

TUCK, J. This is an application on behalf of Jabez B. Snowball, a judgment creditor of the defendant, to set aside the judgment and execution and all subsequent proceeding in this cause, on the ground that the judgment was recovered by fraud and collusion.

The following facts and dates seem to be clearly established by the affidavit of Lemuel J. Tweedie, attorney for Snowball, upon which affidavit the rule *nisi* was granted: The defendant and plaintiff are father and son; that the summons in this cause was issued on the 3rd of September, 1883, and on the same day a *cognovit* was given to the plaintiff for \$5,358.50; that on the 4th September, 1883, judgment was signed on the *cognovit*, for the sum of \$5,358.50 and \$34.60 costs, in all \$5,393.10. On the 10th September, 1883 a *fi. fa.*, returnable on the second Tuesday in June, 1884, was issued to the sheriff of Northumberland, for the amount of judgment and interest from the date of signing. That on the 1st September, 1883, the defendant was indebted to Jabez B. Snowball, in the sum of \$1,847.73 for goods sold and delivered, and an account stated, and on that day Snowball caused a *capias* to be issued

(1) *Stev. Dig.* 1246.  
(2) 24 N. B. Rep. 258.  
(3) 24 N. B. Rep. 300.

(4) 21 N. B. Rep. 277.  
(5) 1 All. 41.  
(6) 3 B. & Ad. 934.

(7) 8 B. & C. 217.  
(8) 11 Grant 39.  
(9) 14 Grant 472.



against the defendant for this debt, upon which he was arrested on the 3rd September. Snowball obtained a verdict against the defendant at the circuit for Northumberland, in March, 1884, and judgment was signed thereon on the 6th May, 1884, for \$1,946.51. On the 9th May, 1884, a *fi. fa.*, returnable in Michaelmas then next, was issued on this judgment, and returned "nulla bona."

1888.

NEILSON  
v.  
NEILSON.Tuck, J.  
—

On the 14th October, 1884, an *alias fieri facias*, returnable in Michaelmas, 1885, was issued to the sheriff of Northumberland, for the same amount. Under this execution, on the 18th June, 1885, the sheriff levied on the personal property of the defendant, but owing to some negotiation for a settlement, the property was not advertised and sold until the 12th of June, 1886, when part of the property sold was purchased by the plaintiff, and part by Snowball. At the sale, the property fetched \$1,593. That part of the property sold, namely, two engines, a boiler and other articles, were claimed by John Brown, under a bill of sale; that the plaintiff requested the sheriff to pay him the proceeds of sale, by virtue of his prior execution; Snowball forbade him so to pay, claiming that plaintiff's judgment was obtained by collusion, and to prevent him realizing his debt.

In Tweedie's affidavit it is stated that the defendant, before and after the sale, evinced a desire to have matters settled, and negotiations went on for a settlement; that on the 6th July, 1885, when the defendant was examined before Judge Wilkinson, he would not swear he owed his son \$5,000; that he had had no proper settlement of accounts before he gave the judgment, but Johnson and Murray, who were also his attorneys, showed him an account before he gave the judgment; he kept no books, etc. That the plaintiff was also examined and said that he kept no books of account; never made any entries against his father; that he and Murray made up the accounts, not from entries, but from calculation; that the account began in 1869 and ended in 1883, and was made up for the purpose of obtaining judgment; that this account was not produced at the examination, and he never rendered his father any account; that in several conversations with Tweedie, the defendant asked him to see Snowball and endeavor to get a settlement;

1888.  
NEILSON  
v.  
NEILSON.  
Tuck, J.

if Snowball paid Brown \$1,000 he would give up the property and then his son's judgment would be discharged in five minutes; and admitted that he made a mistake in giving his son a confession; that when Snowball commenced his action, the defendant claimed that the machinery, tools, etc., in his shop were worth at least \$3,000, and the Tug "Laddie" \$2,000. The real estate in possession of the defendant was mortgaged for its full value; he was possessed of no other property, and he mortgaged the "Laddie" to John Brown a few weeks before Snowball's action.

From the affidavit of James Neilson, Junior, the plaintiff, filed in answer to this application, it appears that the building of the Tug "Laddie" was commenced in 1869, in William J. Fraser's foundry, and finished in 1871; that he is a son of the defendant, and was twenty one years old in 1870; that he worked with Fraser till 1872, with wages at ten dollars a week, and night work extra pay; that his wages amounted to seven hundred and fifty dollars, besides what he earned for night; that this amount by agreement between himself, his father and Fraser, was placed by Fraser to the defendant's credit, and is still due the plaintiff; that during these two years, he drew only his nights' pay; that in June, 1872, he went to Boston, worked there three years, and earned large wages; that his father telegraphed him to come home, and he came in July, 1875; worked for his father till November; there was no bargain for wages; but his five months' work was worth two hundred dollars, beside his board; that he worked in the foundry from November, 1875, till May 1877; during that time he earned \$900, which were placed by Fraser, to his father's credit, and plaintiff drew none of it. In May 1877, he worked for the defendant, in his new machine shop, and continued to do so until September, 1883, at two dollars a day, doing night work besides, which was equal to three months day work a year; that he earned seven hundred and seventy five dollars a year, or four thousand nine hundred and seventy dollars in six years and five months; that during the five months mentioned, he boarded with the defendant; that in making up an account against him, when instituting proceedings in the suit, he credited him with board at \$125 a year, in all \$1,182; clothes,

1888.

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 NEILSON  
 v.  
 NEILSON.  


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 Tuck, J.  


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\$500 (which is more than their value); and five hundred dollars for pocket money, making in all \$2,182, which is all, and more than all that he ever received. When he instructed Johnson and Murray to commence proceedings, he made up his account from memory; that hearing that his father and Snowball had had some trouble and words in the street over their account, and that John Brown had a bill of sale of defendant's property, plaintiff concluded it was time he was looking after his claim; that he and Murray made up his account at Johnson and Murray's office; that he did not state at the examination before Judge Wilkinson, that he and Murray took a confession of judgment; that the account so made up has been mislaid or destroyed, so that it cannot now be produced; that his claim, after credits, amounted to \$5,358.50, for which the confession of judgment was given, and the amount is still due him. That after giving instructions to his attorneys, Johnson and Murray, he made no other arrangements about the matter with the defendant or any other person, and knew nothing more about it until after judgment had been obtained and execution issued; that in obtaining the judgment he acted solely on his own behalf, and for his own protection; that the same was not obtained fraudulently or in collusion with the defendant or any other person; nor was it obtained for the purpose of defeating any other creditor of the defendant; that oftentimes before September 1883, he asked his father to settle with him, and the answer always was, "Wait till I get out of debt;" that prior to, and since 1883, he has been at variance and unfriendly with his father, because he would not make a settlement; that he has never been a party to any negotiation for the settlement of the matter of this suit, or any of the defendant's liabilities, except that Tweedie once made certain offers to him, which he declined; that he never authorized the defendant to say the judgment would be discharged if \$1000 were paid; and any negotiations the defendant had with Snowball, or others, for a settlement, were entirely without his knowledge.

Robert Murray, (of Johnson and Murray), the plaintiff's attorney, also made an affidavit, which was read in answer. He says, that when plaintiff instructed his firm as to suit, he told him what the claim consisted of, and it amounted to \$5,358;

1888  
NEILSON  
v.  
NEILSON.  
Tuck, J.

that on the day the summons was issued, Johnson, who is now out of the Province, had a conversation with the defendant, who consented to give a *cognovit* for the amount; that when the *cognovit* was given, Johnson and Murray had some claim for collection for the defendant, but in this suit, were attorneys and acting solely for the plaintiff; that he has no knowledge of any fraud or collusion in obtaining the judgment.

There is no doubt that the Court has the power to determine upon this motion whether or not the judgment and execution should be set aside, and from the affidavits, it's my opinion the Court should decide without sending the matter down to be tried by a jury. Very few facts are in dispute, as the affidavits in answer contradict only one or two of the statements made in the one upon which the rule *nisi* was granted.

The *onus* of establishing fraud and collusion is upon the applicant, and I think he has failed to establish the requisite proof. The facts stated in support of the application to make out fraud, may be summed up as follows: that the plaintiff is the defendant's son; that the plaintiff issued a summons and received a *cognovit* on the same day; that the plaintiff did not attempt to enforce his judgment till June 1886, although it was signed in September 1883; the amount \$5,358.50, saved by the plaintiff is large; that he kept no books of account, and never rendered the defendant an account; that defendant, when examined before Judge Wilkinson, would not swear that he owed his son \$5,000; that he had no settlement with his son before the confession was signed; that in a conversation with Tweedie, defendant said that if Snowball paid \$1,000 to Brown, the plaintiff's judgment would be discharged; and that the account made up in Johnson and Murray's office was not produced.

In answer to this, the plaintiff shows how his account was made up; how the money was earned from year to year, and after giving credits, how he arrived at the balance of \$5,358.50, and says that this amount is still due him. All the circumstances as to the consideration, are set forth in detail. He says that he endeavoured to obtain a settlement with his father, but was unable to do so; that the *cognovit* was signed without his knowledge; that he never authorized his father, or any

person to make negotiations on his behalf for the debt due him, and refused the offer made by Tweedie, acting for Snowball.

Some of the admitted facts may have a suspicious look, and tend to throw doubt upon the plaintiff's claim; for instance, it may be thought strange that the plaintiff kept no books of account, rendered no account to his father, and delayed so long a time in pressing his claim after he obtained judgment; but these facts may be consistent with entire honesty; considering the relations of the parties, and that the plaintiff was a mechanic, working by the day, it is not surprising that he kept no books of account, nor rendered an account; in fact, a person situated as the plaintiff was, very rarely keeps books of account, and it is hardly to be supposed that he would have left Boston, where he was getting large wages, and have gone to Chatham to work for his father, for only his board, clothes and a little pocket money. The plaintiff would naturally be desirous not to press his father to the wall, and would avoid extreme measures until forced to take them in order to secure his debt.

After all, the important question to be determined is, was the *cognovit* given for a *bona fide* consideration? If it was, the defendant had the legal right to sign it, even if the result would be to secure the debt due his son. Now the plaintiff swears positively that the debt is honestly due him. It is not a mere bald statement, but all the facts as to the consideration are set forth, and the facts sworn to in Mr. Tweedie's affidavit do not warrant me in concluding that what the plaintiff says is false. Had an application been made at the argument, time might have been granted to answer the affidavit read on behalf of the plaintiff; as no such application was made, it is reasonable to think that no sufficient answer could be given.

It seems to me that if, in commencing suit, the plaintiff was endeavoring to get an advantage over other creditors, Mr. Snowball was making a like attempt when he had the defendant arrested.

Then with respect to delay, neither party has been active in forcing a sale under his execution. Mr. Snowball had an

1888.

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 NEILSON  
 v.  
 NEILSON.  


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 Tuck, J.  


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1888.  
NEILSON  
v.  
NEILSON.  
—  
Tuck, J.  
—

execution issued in Michaelmas, 1884, returnable in Michaelmas, 1885; property levied on by the sheriff on the 18th June, 1885, sold the 12th June, 1886, and no application made to this Court until the 23rd April, 1887. The facts stated in Mr. Tweedie's affidavit must have been known to him in Michaelmas, 1884, when he issued his first execution, and yet he takes no steps to get rid of the plaintiff's judgment and execution, which he considers were obtained by fraud, for a period of nearly three years; he does what he can to get Snowball's money by negotiation, and failing in that, he seeks the assistance of this Court to set aside the plaintiff's judgment on the ground of fraud.

But it is unnecessary to decide this case upon the ground of delay, because, in my opinion, the rule must be discharged upon the merits; if, however, upon the facts I could not come to this conclusion, I think the question of delay would be well worthy the consideration of the Court.

WETMORE and FRASER, JJ., concurred.

PALMER, J. The judgment in this case is attacked on two grounds: 1st. That no real debt was due by the father to the son, and if there was, that the judgment was taken to assist the father to hinder, delay and defeat his creditors. The *onus* of proving the latter, if the debt existed, was on the applicant, and I think, if there is no doubt of the whole debt being due, he has wholly failed to establish his case. That the debt was really due is the real question in the case, and I think it was incumbent on the plaintiff to prove this clearly, and if he has failed in that, I think it is our duty to set aside the judgment. No doubt the proving of such matter by affidavits is a most unsatisfactory mode of doing so, and where the matter is between father and son, it is extremely so; therefore, if it was sent to an issue, as far as I am concerned, I would be better satisfied. I have not sufficiently examined the affidavits to say whether the plaintiff has proved the debt, but my brethren have, and inform me that they are all satisfied on that point, and if my opinion was otherwise, it would not alter the result; therefore, I think it useless to delay the judgment for that

purpose; and therefore I do not dissent, but I would be better satisfied if the case were sent to an issue.

1888.

NEILSON

v.

NEILSON.

Palmer, J.

This Court, in this case, is administering equity; but if the applicant had brought a suit in equity, instead of making this application, he could have had an oral examination of the parties as of right, and as he has taken the option of proceeding as he did, he has himself prevented his having it as of right.

SIR JOHN C. ALLEN, C. J., and KING, J., not having heard the argument, took no part.

*Application refused.\**

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\* Affirmed on appeal by the Supreme Court of Canada (16 Can. S. C. R. 719).

1889.

## CAMPBELL v. MCGREGOR, ET AL.

October 18.

*Railway Company—Barn burnt by sparks from engine—Defective smokestack—Hay exposed below sills of barn—Contributory negligence—Liability of sub-contractors for negligence of servants—Tort committed in Quebec—Action for.*

A line of railway was laid out through plaintiff's land on which was a barn containing hay. The sills of the barn rested on blocks and were about 8 inches above the ground on which the hay rested, so that part of it was exposed below the sills. A small part of the barn was within the line of the land taken for the railway, and about 45 feet from the track. In the construction of the railway and while an engine, with a defective smokestack, was passing near plaintiff's barn (the wind blowing strongly) sparks ignited the hay and destroyed the barn.

*Held*—(ALLEN, C. J., and WETMORE, J., dissenting), that the fact of the plaintiff not taking any means to protect the hay, was not evidence of contributory negligence on his part, and need not have been left to the jury.

Contractors with a railway Company for the construction of a railway, are liable for injuries caused by negligence of their servants in running their train.

An action may be maintained in this Province for a wrong committed abroad, if, at the time the action is brought here, the wrong complained of was actionable according to the laws of the Country where committed.

This was an action brought to recover damages for the burning of the plaintiff's barn, through the alleged negligence of the defendants in using a defective locomotive, while engaged as sub-contractors in the construction of a railway in the Province of Quebec.

The evidence given on the trial, which took place before His Honor Mr. Justice Fraser at the Restigouche circuit, in August, 1888, is sufficiently referred to in the judgments. A verdict was found for the plaintiff, with leave reserved to the defendants to move to enter a nonsuit.

June 28, 1888. *L. A. Currey* moved for a nonsuit, pursuant to leave reserved, or, failing that, for a new trial, and

*McAlister*, contra.

*Cur. adv. vult.*

The following judgments were now delivered:

TUCK, J. I think that this action can be maintained, and that there is no ground for a nonsuit.



It is not necessary for the plaintiff to show that there was due care or an absence of negligence on his part. It is sufficient for him to prove negligence by the defendants; and unless it appear from the plaintiff's evidence that but for negligence or want of ordinary care and caution on his part, of such a character, the misfortune would not have happened, he is entitled to recover. Some cases in the neighboring States seem to hold a contrary view, but this is the law as settled by the Courts of this country and in England.

Another ground urged for a nonsuit is, that the wrong parties are sued; that the action should have been brought either against Doherty, the driver of the locomotive, or the Railway Company which was constructing the road. The defendants were contractors for building that portion of the Baie de Chaleur Railway which ran by the plaintiff's farm, and were operating the locomotive from which were emitted the sparks which set fire to and caused the burning of the plaintiff's barn. Doherty was the engine driver of the locomotive at the time of the accident. It may be that the Company are liable if they were guilty of negligence; but their being liable does not excuse the defendants. They are liable, if through the negligence of themselves or their servant, the plaintiff's barn was burnt.

*Hole v. The Sittingbourne Ry. Co.* (1), *Green v. The Mayor of St. John* (2), and *Craig v. Chisholm* (3), cited by the defendant's counsel, are all virtually authorities for this proposition. In September 1887, when the barn was burnt, the locomotive was under the defendants' control, and was being used for the purpose of conveying ballast from one part of their work to another part. Doherty was their servant, employed by them. Surely then they are liable for the negligent use of the locomotive, while thus engaged.

The negligence complained of in this case is, that there was not a properly constructed netting over the smoke stack of the locomotive, and the jury upon question left to them have so found. Milton Doherty's (the driver) evidence is, that on this day wood was being burnt on the engine; that the netting used was for a coal burning engine; that a finer netting is

1889.

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 CAMPBELL  
 v.  
 MCGREGOR.

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 Tuck, J.  


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(1) 6 H. &amp; N. 498.

(2) 1 Han. 531.

(3) 1 P. &amp; B. 218.

1889.

CAMPBELL

v.

MCGREGOR.

TUCK, J.

required for wood, and that the netting over the smokestack had a hole in it, four inches long and one and a half inches wide. He had repaired this netting before the fire, by putting a patch on it; but immediately after the fire he looked at it and the patch had moved off. Doherty says also that wood and coal are not frequently burnt on the same engine; that the train hands on the Baie de Chaleur road burnt wood and coal on the same engine, but he never knew this to be done on the Intercolonial Railway while he was working there. The jury in answer to questions, found that the fire was occasioned by sparks from the locomotive; that the spark arrester on the smokestack was proper for a coal burning locomotive, but not sufficient for a wood burning one; that wood was being burnt the day of the fire, and the spark arrester was not in good condition. No objection is made to these answers, or that they are unwarranted by the evidence, but the defendants contend that the learned Judge should have left the question of contributory negligence to the jury. The jury were told that there was no evidence of contributory negligence; and I think this direction was right. The north-west corner of the plaintiff's barn which was burnt, was forty eight feet six inches from the centre of the railway track. Hay was stored in the barn, which sat on blocks. The hay came below the sill of the barn from six to eight inches on the north side, and all along that side, say about nineteen feet, the hay was exposed, as to that part of it which came below the sill. The wind blew almost a gale, and the hay was very dry, having been in the barn almost two years. The railway lies entirely in the Province of Quebec, and its construction was commenced sometime in the summer of 1887. In the opinion of the plaintiff, a cinder from the engine, blown by a strong wind, set fire to the hay which projected from the bottom of the barn. There is also evidence that this barn was built long before the construction of the railway at this place.

Mr. *Currey* contends that there was negligence or want of ordinary care or caution on the part of the plaintiff in leaving his hay exposed; that knowing this locomotive was passing backwards and forwards, he ought to have taken some means to protect his hay from exposure to the sparks.

In my opinion no such duty was cast upon him by the building of the Company's road. His barn was at a reasonably safe distance from the railway track; it had been built before the railway works were started, and the plaintiff had been guilty of no negligence since the locomotive began to pass up and down the road. No hay or other dry and combustible material had been negligently left by the plaintiff between his barn and the railway track, whereby fire could be started or made to spread. He simply allowed his barn and hay to remain in the same position in which they were before the railway was built. I think he had a perfect right to do this, and that building a railway through his farm did not put upon him any legal obligation to alter the construction of his barn or the manner of storing his hay. For all ordinary purposes his barn was safe from fire, and his hay was securely stored. I am not prepared to subscribe to the doctrine, that everybody and everything must give way to the railroads. The rights of the individual are first to be considered; and because a railway company receives important and valuable privileges and franchises from the people, it does not follow that personal rights are to be abridged.

If the defendants argument is sound, there is nothing left for the plaintiff but to get his barn so far away from the railway track, that burning cinders emitted from a locomotive supplied with an insufficient netting for its smokestack, and driven by a gale of wind, shall not reach it. I am satisfied that there is no law for such argument.

*Vaughan v. Taff Vale Ry. Co.* (1), is a case, where a wood adjoining the defendants' railway was burnt by sparks from the locomotives. There the Court held it was no defence that the plaintiff had allowed his wood to become peculiarly liable to take fire by neglecting to clear away the dry grass and dead sticks. Martin B. says: "It would require a strong authority to convince me that because a railway runs along my land I am bound to keep it in a particular state;" and Bramwell B. says: "The plaintiff used his land in a natural and proper way for the purposes for which it was fit. The defendants come to it, he being passive, and do it a mischief." I am not

1889.

CAMPBELL

v.

McGREGOR.

Tuck, J.

1889.  
 CAMPBELL  
 v.  
 MCGREGOR.  
 Tuck, J.

aware that the authority of the Exchequer Court on this point has ever been shaken.

This is a leading case upon the question, and may be said to settle the law. Afterwards on appeal (1), the judgment was reversed in the Exchequer Chamber, but on another point.

The appellate Court held (reversing the Court of Exchequer on the first point) "that a railway company authorized by the legislature to use locomotive engines is not responsible for damage from fire, occasioned by sparks emitted therefrom, provided it has taken every precaution in its power, and adopted every means which science can suggest, to prevent injury from fire, and is not guilty of negligence in the management of the engine." On the second point, however, the decision of the Court of Exchequer is undisturbed. I think the law there laid down by both Courts is peculiarly applicable to this case, both as to the defendants' negligence, and the question raised as to the plaintiff's contributory negligence.

*Robinson v. The New Brunswick Ry.* (2) is unlike this case. All the Court decided there was, that in a country like this, the Company was under no obligation to use coal for fuel. *The Canada Southern Ry. Co. v. Phelps* (3), and *The Canada Atlantic Ry. Co. v. Moxley* (4), are authorities directly bearing on this case as to the defective condition of the locomotive.

There is just one other ground which was argued for a new trial—the improper admission of the evidence of Milton Doherty, Donald Brown and Joseph Doherty, of the burning of buildings on that day and other days. The principal part of this evidence was elicited by Mr. Murray, defendants' counsel, in his cross-examination of Donald Brown. Nearly all the damaging evidence on this subject was given by Brown on this cross-examination. I incline to think that evidence, in this respect given in answer to questions put by the plaintiff's counsel, was admissible. He had a right to shew that sparks which were from time to time emitted from this locomotive, fell upon the track, and that in some instances the sparks set fire to the fences or buildings. This evidence was rightly given to shew what kind of locomotive it was. I think the principle

(1) 5 H. & N. 679.  
 (2) 11 Can. S. C. R. 688.

(3) 14 Can. S. C. R. 132.  
 (4) 15 Can. S. C. R. 146.

which governed the Court when it said that the evidence should have been admitted in *Brown v. The Eastern & Mid-lands Ry. Co.* (1), may be applied here. In that case, which was an action for negligence, the defendants had placed a heap of earth and refuse on their land, adjoining the highway. The plaintiff was driving at night in a cart along the highway when the horse shied at the heap, the cart was upset and the plaintiff injured. At the trial the Judge excluded evidence to shew that after the placing of the heap on the ground several horses passing the place shied at the heap. The Queens Bench Division held that this evidence was improperly rejected, and their decision was affirmed on appeal.

1889.  
CAMPBELL  
v.  
MCGREGOR.  
Tuck, J.

In my opinion there is no ground for disturbing the verdict.

FRASER, J. I agree with my brother Tuck.

KING, J. This is an action to recover damages for hay and other contents of a barn destroyed by fire, through the alleged negligence of defendants in using a defective locomotive engine while engaged as sub-contractors in the construction of the Baie de Chaleur Railway, in the Province of Quebec. The plaintiff obtained a verdict for \$328.25, and defendants have moved for a nonsuit, pursuant to leave, or for a new trial. The Act incorporating the Baie de Chaleur Railway Co. is 45 Vic., cap. 53, of the Acts of Quebec, and it provides, amongst other things, that the Company shall be vested with all the rights and privileges required to build and work a railway starting from a point on the Intercolonial Railway, in the vicinity of the Restigouche river, and extending to New Carlisle or Peshebiac Bay, with the right of continuing the line to Gaspé Basin. The plaintiff owned land in the Province of Quebec on the line of the railway, and a portion of it was taken for the railway. Upon the land there was a barn, the northeastern corner of which was about two feet within the line of the land so taken, and about forty-seven feet from the centre of the railway track as laid down. The north side of the barn faced the railway track, but was not entirely parallel with it. The barn was used for storing hay, etc., and at the

(1) 22 Q. B. D. 391.

1889.

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CAMPBELL  
v.  
MCGREGOR.

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King, J.

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time of the fire was almost filled with hay, oats, etc. It was built on blocks, and the sills were about eight inches above the poles that lay on the ground and on which the hay rested. The space between the sills and the ground was open, so that at a short distance from the barn the hay could be seen.

The defendants had contracted for the building of ten miles of railway with one Armstrong who was contractor with the Company for the construction of the entire line. The defendants were to do the grading, ballasting, etc. Under the contract they were to be provided with an engine free, for use in the execution of their contract. The engine was the property of the Railway Co., and was doubtless furnished by them to Armstrong under similar terms to those named in the sub-contract, and was by Armstrong furnished to defendants under the contract between them. The defendants employed and paid the men who had charge of the engine, and it was run under their orders. The engine was a coal-burning one, but at the time of the fire complained of was using wood as a fuel. In a coal-burning engine the meshes in the spark-arrester — a wire netting over the top of the smokestack — are larger, or more open, than in the wood-burning engine. The consequence, therefore, of using wood in a coal-burning engine would be that the sparks would be emitted more readily than if the fuel and engine were adapted for each other. It also appeared on examination of the netting after the accident that there was a hole in it four by one and a half inches, caused by the displacement of a patch which the driver had shortly before put there.

The weather had been very dry for some time prior to 20th September, and on that day the wind was very high. The plaintiff's attention had been directed to the fact that the engine was emitting sparks freely, and he swore that at the time of the fire he was watching the barn. In answer to a question, on cross-examination — "What were you doing by the barn on that day?" — he answered: "Watching the fire when I saw the engine coming, for fear it would set fire to the barn. I watched it every time the engine passed. I was apprehensive of a fire on account of when the locomotive went up after dark the sparks seemed to fall all around the barn.

I stood and watched the locomotive pass, and went to the house then and got some water to put in barrels to wet it that day, as it was blowing so hard and dry. I did not get the water, but only got the length of the house when I saw the smoke." Q. "You made no attempt to cover up this hay that was under this part of the barn?" A. "That had been there for two years in the same position. I never put anything under it."

At the time of the fire the engine was hauling a loaded ballast train of six cars, and on an up grade past the barn. This required more steam, and more fire would be thrown out. The reasonable inference from the proved facts is that the sparks from the engine set fire to the barn; and that this was occasioned through the negligence of defendants in running the engine with defective provision for preventing the undue emission of sparks. Indeed, Mr. *Currey*, in the end, admitted this. He makes, however, three further contentions for a nonsuit: First, that the plaintiff must shew an absence of contributory negligence on his part. In *Wakelin v. London & Western Ry. Co.* (1), the duty of plaintiff and defendant respectively as to burden of proof, is thus put by Lord Watson: "The plaintiff must allege and prove not merely that the defendant was negligent, but that his negligence caused or materially contributed to the injury. While the onus of proving affirmatively that there was contributory negligence on the part of the plaintiff rests, in the first instance, upon the defendant, in the absence of evidence tending to that conclusion, the plaintiff is not bound to prove the negative in order to entitle him to a verdict; but in the course of the trial, the onus may be shifted to the plaintiff so as to justify a finding in the defendant's favor, to which he would not otherwise have been entitled; as, for instance, where the evidence for the plaintiff discloses facts and circumstances leading to the proof of contributory negligence." Here the evidence on behalf of plaintiff shewed the circumstances which, according to Mr. *Currey*, required the plaintiff to shew that there was no contributory negligence. The effect of the evidence on the point will be considered in connection with the grounds of motion

1889.

CAMPBELL.

v.  
MCGREGOR.

King, J.

(1) 12 App. Cas. 41.

1889.

CAMPBELL  
v.  
McGREGOR.

King, J.

for new trial. It is sufficient here to say that there is no conclusive proof of contributory negligence, such as would alone qualify a nonsuit on this ground.

Next it is said that the action lies only against the engine driver or the Railway Co.; but in *Murray v. Currie* (1), Willes, J., says: "You must look to the wrong-doer himself or to the first person in the ascending line who is the employer and has control over the work. You cannot go further back, and make the employer of that person liable." See also *Reedie v. London & Northwestern Ry. Co.* (2).

Here the driver was the servant of defendants, as were all others connected with the running of the train; and according to the evidence of the driver, it was part of his duty to make minor repairs incidental to running the engine.

Next it is said that the Court has no jurisdiction over a tort committed in Quebec. While, as to local actions, *i. e.*, such as would be local if they arose here, there is no jurisdiction where the cause of action arises abroad, there is, as to transitory actions, a general right of action in cases of tort, as well as of contract, where the cause of action arises abroad. The service of process is to be within our territorial jurisdiction, and the mode of procedure is to be governed by the *lex fori*, while (subject to what is to be presently said) the cause of action is to be judged by reference to the *lex loci*. "As a general rule," says Willes, J., in *Phillips v. Eyre* (3), "in order to found a suit in England for a wrong alleged to have been committed abroad two conditions must be fulfilled: First, the wrong must be of such a character that it would have been actionable if committed in England (citing *The Halley* (4)). Secondly, the act must not have been justifiable by the law of the place where it was done;" *i. e.*, it must have been an actionable tort according to the laws of the country where committed, and have remained undischarged and actionable there up to the time of action brought here. See generally on the subject, Story's Conf. Laws 542-3; *Phillips v. Eyre* (3); *The Halley* (4); and notes to *Mostyn v. Fabrigas* (5). If Mr. Currey's objection had been to the sufficiency of the proof that

(1) L. R. 6 C. P. 24.

(2) 4 Exch. 244.

(3) L. R. 6 Q. B. L.

(4) L. R. 2 P. C. 193.

(5) 1 Simth L. C. 662.



what is complained of was a tort by the laws of Quebec, I am not sure but he might have succeeded; but the objection was the general one noted, and was based, as I understood it, upon the notion that while the act was a tort in Quebec, it was not cognizable by our Courts.

Then, as to the grounds of motion for a new trial; several of these consist of objections to the learned Judge's charge respecting the question of defendants' negligence, and these are not necessary to be considered, as Mr. *Currey* does not now contest the proof of defendants' negligence. The remaining ground of objection, variously stated as misdirection and non-direction, relates to whether or not there was evidence of contributory negligence. The alleged contributory negligence of plaintiff was in not closing the space between the sill of the barn and the ground. The defendants contend that the ignition of the hay by sparks being carried by a high wind into the open space was something that could reasonably have been foreseen, and ought to have been guarded against.

In *Robinson v. New Brunswick Ry. Co.* (1), the same question arose under circumstances which were not so strong for the defendants in that action as are the circumstances in this case for the present defendants; for in that case the barn was about 200 feet from the track; but the like question of law as to the obligation of the landowner arose. Sir Wm. Ritchie and Mr. Justice Strong differed on the point, and the other Judges expressed no opinion touching it. One can see that it might well be common prudence for a landowner adjoining a railway to take reasonable care to protect his property from damage by sparks emitted from a proper locomotive run in a way; that is to say, from the kind of a locomotive authorized by the legislature, and run in a way authorized by the legislature. From such a locomotive, run in such a way, he might reasonably expect that sparks might occasionally be emitted to some extent, and a prudent man would not needlessly expose his property to such risks of fire. This is what might be called unavoidable perils to which it is subject under legislative authority. But where the fire is occasioned by unavoidable perils, *i. e.*, by the use of the railway in a way authorized

1839.

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CAMPBELL  
v.  
McGREGOR.  

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King, J.

1889.  
CAMPBELL  
v.  
MCGREGOR,  
King, J.

by statute, there is no liability of the company at all, and the plaintiff's want of care in the protection of his property is immaterial, so far as regards the action. Here, however, the fire was occasioned by what might and ought to have been avoided by defendants (even supposing them to have succeeded to the Railway Company's legislative immunities). Their act was the efficient cause of the damage; and, after their negligent act became apparent, I do not think that plaintiff reasonably omitted anything which ordinary care required. Because the defendants were negligent yesterday, it is no reason why plaintiff should assume that they will repeat the negligence today; and after it became apparent on the day of the fire that the engine was emitting sparks in large quantities, there was no reasonable opportunity for plaintiff to get boards and close the open space in his barn.

I do not think that it is negligence in plaintiff not to have guarded against a possible repetition of defendants' previous acts of carelessness. On the contrary, it was reasonable to assume that they would not be repeated. I therefore think that the learned Judge properly withheld any question of contributory negligence from the jury, and that the rule is to be refused.

PALMER, J. This was an action for burning the plaintiff's barn by negligence in running a defective locomotive engine in building a railway.

There is no doubt of the gross negligence of the defendants' servants in running the engine with a most imperfect smoke-stack, of such a dangerous character that plaintiff's barn was burned thereby; but it was contended that there was evidence of contributory negligence in the plaintiff by his leaving the barn in the condition it was near the railway, which the learned Judge should have left to the jury.

The plaintiff's barn had been standing where it was, before the defendants commenced to build the railroad, and its condition was known to the defendants' servants; and if it be admitted that it was dangerous to have left it there with engines running even properly constructed, and that state of facts would afford evidence for a jury of the plaintiff being

guilty of negligence in keeping it in that state, still when it is established that the defendants were guilty of negligence in running an improper engine and that this was the proximate cause of the injury, they in order to get rid of the liability must shew two things. First: That the plaintiff had been negligent and might have avoided the consequences of the defendants' negligence. Secondly: That the plaintiff's negligence was of such a character that the defendants could not have avoided the accident by reasonable care; in other words, that the plaintiff had done a negligent act that was the proximate cause of the injury. I think there is no evidence of this last proposition to be submitted to a jury. It is not contributory negligence merely because the plaintiff has not anticipated the defendants' negligence and removed the barn or put it in the state better to resist sparks, for the plaintiff had the right to presume that the defendants were going to act with ordinary care without he had some notice to the contrary, when it would have been his duty to have taken ordinary care to avoid any injury that might reasonably result from it. The same rule applies to plaintiff when his negligence is the immediate cause of the injury; for he cannot presume that the defendant is going to be guilty of negligence and provide against it, but when he is aware of it, as here, he was bound to avoid it, which is this case. For, if it was negligent for the plaintiff to have his barn in the condition it was, the defendant had full notice of it and he ought to have avoided it.

1889.

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CAMPBELL  
v.  
MCGREGOR.  

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Palmer, J.  

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Therefore there was, in my opinion, no sufficient evidence of contributory negligence to be left to the jury; and if there is no evidence of contributory negligence it cannot be left to the jury any more than the defendants' negligence when there is no evidence of it. See judgment of Lord Penzance on the *Dublin, Wicklow and Wexford Railway Co. v. Slattery* (1).

I therefore think that the rule for a new trial should be refused.

SIR JOHN C. ALLEN, C. J. One of the questions in this case is, whether, admitting that there was negligence in the manner of running the locomotive, the present defendants are

1889.  
CAMPBELL  
v.  
McGREGOR.  
Allen, C. J.

liable, or whether the action should not have been brought against "The Baie de Chaleur Railway Company"—a company incorporated by an Act of the Province of Quebec 45 Vic., cap. 53, for the construction of a railway from some point on the Intercolonial Railway in the vicinity of the Restigouche River, and extending to New Carlisle or Paspebiac Bay.

It appears that one Charles Armstrong was the contractor with the Company for the construction and equipment of one hundred miles of this railway, and that he had sub-let a section of ten miles of it to the defendants, who were to do the grading, ballasting, building the culverts and track laying; and they were supplied with an engine to assist them in doing the work. It was in the progress of this work that the fire took place by which the plaintiff's property was destroyed. The engine driver was employed and paid by the defendants.

I think there can be no question that the action was properly brought against the defendants, if there was negligence.

The case of *Reedie v. London & North Western Ry. Co.* (1) is decisive on this point. There, a company authorized by Act of Parliament to construct a railway, contracted with persons to make a portion of the line, reserving the power of dismissing any of the contractors' workmen for incompetence. The workmen, in constructing a bridge over a highway, negligently caused the death of a person passing along the highway; and it was held that the company was not liable in an action brought by the administratrix of the deceased, under Lord Campbell's Act. Rolfe, B., in delivering the judgment of the Court, said: "The liability of any one, other than the party actually guilty of any wrongful act, proceeds on the maxim, '*Qui facit per alium facit per se.*' The party employing has the selection of the party employed, and it is reasonable that he who has made choice of an unskilful or careless person to execute his orders, should be responsible for any injury resulting from the want of skill or want of care of the person employed; but neither the principle of the rule, nor the rule itself, can apply to a case where the party sought to be charged does not stand in the character of employer to

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(1) 4 Exch. 244.

the party by whose negligent act the injury has been occasioned."

1889.

CAMPBELL

v.

MCGREGOR.

Allen, C. J.

The case of *Allen v. Hayward* (1) was decided on the same principle. It was held there that the defendants, commissioners for improving the navigation of a river, were not liable for the negligent construction of works by a contractor under them, he not being regarded as a servant for whose acts they were liable, but as a person carrying on an independent business.

In *Craig v. Chisholm* (2), the question was whether Chisholm was liable for the negligent conduct of a servant whom he had employed for one McDonald, the contractor for the construction of a section of the Intercolonial Railway, Chisholm having been employed by McDonald to superintend the performance of the work, with power to employ servants for McDonald, and to discharge them as he thought proper, the servants so employed being paid by McDonald. It was held that Chisholm was not liable; that the action should have been brought either against McDonald or against the person who actually did the injury; and that the relation of master and servant did not exist between Chisholm and the person who did the injury.

That rule was acted on in *Murray v. Currie* (3), where Willes, J., said: "I apprehend it to be a clear rule, in ascertaining who is liable for the act of a wrong-doer, that you must look to the wrong-doer himself, or to the first person in the ascending line who is the employer and has control over the work. You cannot go further back, and make the employer of that person liable."

The case of *Hole v. Sittingbourne Ry. Co.* (4) was relied on by the defendants to shew that the action should have been brought against the railway company. There the defendants were incorporated for the purpose of constructing a railway crossing a navigable river by an opening bridge. The Act provided that it should not be lawful to detain any vessel navigating the river any longer time than was sufficient to enable any trains, passengers, etc., ready to go over the bridge,

(1) 7 Q. B. 960.  
(2) 1 F. & B. 218.

(3) L. R. 6 C. P. 24.  
(4) 6 H. & N. 488.

1889.  
CAMPBELL  
v.  
MCGREGOR.  
Allen, C. J.

to cross the same, under a penalty; which should not prevent any remedy for damages which any person might sustain by any detention. The defendants employed a contractor to construct the bridge according to the provisions of the Act, but before it was completed, the bridge, from defective construction, could not be opened, and the plaintiff's vessel was prevented from navigating the river. It was held that the defendants were liable for the damage, and that they could not relieve themselves from liability by contracting with another person to build the bridge for them. The Court distinguished the case from *Reedie v. London & North Western Ry. Co.* and *Allen v. Hayward*, and other cases of that class, on the ground that the relation of master and servant did not exist in the case then under consideration, and also that the act complained of was collateral, and not the natural result of the act ordered to be done. In *Ellis v. The Sheffield Gas Co.* (1), where the question arose whether the defendants or a contractor under them were liable for an injury done, Lord Campbell said: "I am clearly of opinion that if the contractor does the thing which he is employed to do, the employer is responsible for that thing as if he did it himself." In such a case, the maxim "*Qui facit per alium facit per se*" would apply.

I am unable to see any very clear distinction between the case of *Hole v. Sittingbourn Ry. Co.* and *Reedie v. London & North Western Ry. Co.*, and the other cases where the same principle was adopted. If there is a distinction, I think the present case falls within the principle of *Reedie v. London & North Western Ry. Co.*, because the defendants here were not the servants of the Baie de Chaleur Railway Co., but occupied an independent position, having the selection and entire control of the workmen, and the sole management of the works within the section which they had contracted to construct; and also that the act complained of was not the natural result of what the defendants contracted to do.

The other question in the case — whether there was contributory negligence on the part of the plaintiff — is, I think, one of some difficulty. One corner of the plaintiff's barn was within the bounds of the land taken by the railway company,

and only forty-eight feet distant from the centre of the track. The sills of the barn were raised six or eight inches from the ground, and there was considerable hay in the barn, placed upon poles laid on the ground, so that it was exposed along the side of the barn facing the railway, in the space between the ground and the sills, and in some places projecting beyond the sills. It was in this space that the hay caught fire from sparks emitted from the engine. The barn was built a year or more before the railway was laid out, and the plaintiff had not done anything to cover or protect the hay where it was exposed between the sill and the ground.

Though I do not say that the plaintiff was bound to move his barn from the railway, I think it is a matter of some importance in the consideration of this question that the removal of the barn was spoken of between him and one of the directors of the Company, and he wished them to pay the expense of moving it, which shows that he thought it was in a dangerous position, and ought to be moved. In addition to that, when he was at the barn just before the fire occurred, he said that he was alarmed, and was going to his house for water when the fire broke out. It seems to me, therefore, that, under these circumstances, it was some evidence of negligence on his part to leave his hay in such an exposed condition, with a railway engine passing backwards and forwards within about forty feet of it, probably several times a day. If he chose to take the risk of leaving his hay so exposed, I think it was a question for the jury whether he must not submit to the consequences of his imprudence.

I do not think it properly enters into the consideration of this question that the engine which the defendants were using was defective in its apparatus to prevent the escape of sparks. That would have been a very proper matter for the jury to consider in determining whether, although the plaintiff was guilty of negligence, the defendant might not have avoided the accident if their engine had been properly constructed; but I think it ought not to affect the question of the admission of the evidence of the plaintiff's contributory negligence; nor ought the question now to be treated as if the evidence had been received and the jury had passed upon it, and we were

1889.

CAMPBELL

v.

MCGREGOR.

Allen, C. J.

1889.  
CAMPBELL  
v.  
MCGREGOR.  
Allen, C. J.

considering whether the verdict was against evidence. The only question now is, was there, or was there not, evidence of contributory negligence to leave to the jury for their consideration.

In *Vaughan v. Taff Vale Railway Co.* (1), the action was brought for negligently setting fire to the plaintiff's wood by means of coals emitted from the defendants' locomotive; and it was contended that the plaintiff was guilty of contributory negligence, because his land was covered with combustible vegetation, which caused the fire to extend; but the Court said that the plaintiff was at liberty to use his land in its natural state, and was not bound to take any precautions against the danger of fire. There the plaintiff's land adjoined the railway embankment, and the fire was first seen in the wood fifty yards from the railway; but there were traces of fire extending continuously from the railway to the wood through dry grass on the embankment. That, no doubt, is a somewhat strong authority in favor of the ruling in this case. But in *Robinson v. The New Brunswick Ry. Co.* (2), where the plaintiff's barn was burnt from sparks emitted from the defendants' locomotive under circumstances very similar to those in the present case, Ritchie, C. J., said: "No doubt the plaintiff has the right to use his barn as he pleases; but knowing that the Legislature has permitted the running of locomotives on the railway passing his barn, if he chooses to place in it combustible materials, and to leave it in such a condition that such combustible materials are exposed to sparks from the engine, though provided with all the usual and requisite appliances for preventing the escape of sparks and the prevention of accidents, and an accidental spark should ignite such combustible material, and cause the destruction of the barn and its contents, the owner must submit to the risk, as a consequence of the Legislature having permitted the use of a dangerous agent. \* \* \* There was, in my opinion, evidence most proper for the consideration of the jury, as to whether the plaintiff was not guilty of great negligence in placing such a combustible article as hay in a barn so near the railway (the distance in that case was about two hundred feet), with such

(1) 5 H. & N. 679; 4 Jur. N. S. 1302.

(2) 11 Can. S. C. R. 688.



openings as exposed such combustible material to fire from sparks from passing locomotives. I think the correct rule was laid down in *Collins v. New York Central Ry. Co.* (1), that one whose property is exposed to risk or injury from or by reason of its location, as where it is situated in a position of constant exposure to fire on the side of a railroad, must use such care as prudence would dictate, in view of the unavoidable perils to which it is subject."

Strong, J., did not, however, take the same view of the question of contributory negligence. He said that he was not able to concur in the view that contributory negligence on the part of the plaintiff was shewn by the fact that he maintained his barn in a dangerous proximity to the railway; and that a land owner had a right to make any use of his land that he pleases, and was entitled to be protected in that use against injury from the culpable negligence of others.

In this conflict of opinion, it is difficult to say what is or is not evidence of contributory negligence to be submitted to a jury in such a case as the present. I cannot, however, come to any other conclusion than that the conduct of the plaintiff in this case falls within the principles laid down by the learned Chief Justice in the passages which I have quoted from his judgment — the danger of igniting the hay being considerably greater in the present case than in *Robinson v. New Brunswick Ry. Co.*

I therefore think there should be a new trial on this ground.

WETMORE, J. I agree with the judgment of the learned Chief Justice.

*Motion refused.*

1889.

CAMPBELL  
v.  
MCGREGOR.  
Allen, C. J.

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(1) 12 N. Y. Rep. 502.

1884. THE MUNICIPALITY OF YORK v. THE MAYOR, &c.,  
OF THE CITY OF FREDERICTON.

August 23.

*City of Fredericton—Municipality of York—County Buildings—  
Liability for expenses in connection therewith—Acts 42 Vic., cap.  
41, and 45 Vic. cap. 65.*

*Held—*by ALLEN, C. J., PALMER and KING, JJ., (WELDON, J. dissenting)—  
That the Act 42 Vic., cap. 41, does not impose any liability upon the City  
of Fredericton to pay a portion of the expenses incurred by the County  
Council of York under Act 45 Vic., cap. 65, in fitting up offices for the  
Registrar of Deeds, and for the Sheriff and Clerk of the Peace for the  
County of York.

Per WELDON and WETMORE, JJ., that the City is liable for one third of the  
expenses in connection with the office of the Registrar of Deeds.

SPECIAL CASE submitted for the opinion of the Court.

It is admitted that the land on which the York county  
Court house in the City of Fredericton was erected, was  
by grant bearing date 27th November, 1815, vested in the  
Justices of the Peace of the county of York, among other  
things: "in trust, nevertheless for the public uses following, to  
wit: the lower flat of the said building, or any other building  
which may at any time hereafter be erected on the same site,  
should the present be destroyed, and all other the land and  
premises hereby granted, for a public market place; and the  
upper floor of the same or any other building, as aforesaid, for  
the purpose of a county court house forever; and to and for  
no other use, intent or purpose, whatsoever." See *Edwards v.  
Burgoyne* (1). And that the control was at different times in  
the City Council and County Council, but lately in the county,  
as declared by Act of Assembly, 20 Vic. cap. 17, by the 3rd  
section of which the said premises were declared to be under  
the control of the County Council of the county of York and  
their successors, for the purposes of the court and market, and  
for no other purpose whatever.

2. That the present Court house was erected about the year  
1854, and the expense was paid by the County and the City,  
under the provisions of 16 Vic. cap. 40, and 21 Vic. cap. 52.

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(1) 21 N. B. Rep. 223.

The county making the expenditure under 16 Vic. and the city contributing its proportion under 21 Vic.

1884.

THE MUNICIPALITY OF YORK

v. THE MAYOR, ETC., OF THE CITY OF FREDERICTON.

3. That up to the year 1882, the upper flat of the said building was used as a Court house and jury rooms; and that the County Council twice a year occupied a room in said upper flat for their meetings.

4. That in the year 1881, the County Council of York received a notice from the Government of New Brunswick that they would require the ground on which the building used as a Record office and Clerk of the Peace office of the county of York then stood; and that no notice of such demand was conveyed to the city corporation.

5. That the former Record office and Clerk of Peace office was not a suitable building in all respects, and that some arrangements were required for a new Record and Clerk of the Peace office for the city and county, to be constructed at an early date; and it is admitted that the City Council were not consulted by the County Council in respect to the state of the Record office and the necessity for a new building.

6. That the Act of Assembly 45 Vic., cap. 65, intituled, "An Act to authorize the County Council of the Municipality of York to convert a portion of the lower flat of the county Court house into a Record office, and other public offices and rooms," was presented to the Legislature at the instance of the County Council of the Municipality of York, and accompanied by a petition praying for the passage of the same by that body, and that the same was duly advertised as required by the rules of the House of Assembly; and further, that the city corporation, or the City Council of Fredericton, were not advised with, before the introduction of such bill, and had no part in any manner in the introduction of the same, and opposed the passage thereof through the Legislature.

7. That in the year 1882, after the passage of said Act, the said County Council did take possession of the lower flat of the Custom house, being two-thirds of the market therein, and fit up and build therein the following offices, viz., two rooms and a vault for Record office, two rooms to be used as a Sheriff and Clerk of Peace office with vault, a hall-way across the building, and a room to be used as a County Council chamber,

1884. being 43 feet by 22 feet, the whole being finished in a good workmanlike manner, with a furnace to heat the whole building, at a cost of \$3,324.12.

THE MUNICIPALITY OF YORK  
v.  
THE MAYOR,  
ETC., OF THE  
CITY OF FREDERICTON.

8. That one-third of the said lower flat, being the space mentioned by said Act, was left as a market, and fitted up as such by the County Council; and it is admitted that the expense of such fitting up of the market is to be borne by the city and county jointly, in the proportion prescribed by law.

9. It is admitted that the Record office has since been used as the Record office in and for the County of York, the Registrar of deeds being placed in possession of the same by the County Council, and that as such Record office for York County has also been the Record office of the City of Fredericton, and that the Sheriff of York was put in possession of one of the other two offices by the County Council, and since occupied it; that the County Council have since held their meetings in the room fitted up as a council chamber.

10. That the plaintiffs do not make any claim for the expense of fitting up the County Council chamber and furnishing the same; and it is admitted that the expense of the furnace and fittings, the putting up a room for the clerk of market and fitting up said market, is to be borne jointly by city and county, in proportion as provided by the Act.

11. It is admitted that the wording of the grant of said premises, as cited in the judgment of His Honor the Chief Justice in *Edwards v. Burgoyne* (1), is a correct copy of said grant.

12. It is admitted that the sum of \$400.00 has been received from the Provincial Government for the old Record and Clerk of Peace office, and that the same is to be credited on charges made by Council for Record office, Clerk of the Peace office and vault.

13. It is admitted that previous to the sheriff being provided with the new office in the county court house, he always procured his own office at his own expense.

*Questions.* — 1st. Is the City liable, and bound to pay and contribute a proportion towards paying for building the Record offices and vault, or the Sheriff and Clerk of the Peace offices

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(1) 21 N. B. Rep. 228.

and vault, under Acts of Assembly 42 Vic., cap. 41, and 45 Vic., cap. 65? 1884.

2nd. Had the County Council any authority under the Act of Assembly 45 Vic., cap. 65, to use any portion of the said lower flat as a Council chamber for the exclusive use of the County Council, and to appropriate a portion of said market for that purpose? THE MUNICIPALITY OF YORK v. THE MAYOR, ETC., OF THE CITY OF FREDERICTON.

3rd. Is there any authority under said Act of Assembly 42 Vic., cap. 41, which would justify the City Council of the City of Fredericton, under above facts, paying a proportion of fitting up said rooms as Record offices and Sheriff's and Clerk of the Peace offices and vaults?

4th. Was the Sheriff's office a necessary office to be provided by the County Council, at the joint expense of the City and County?

June 13, 1884. *H. B. Rainsford* was heard for the Municipality of York, and

*C. W. Beckwith*, for the City of Fredericton.

*Cur. adv. vult.*

The following judgments were now delivered :

ALLEN, C. J. The Act 45 Vic., cap. 65, authorized the County Council of York County to convert a certain defined portion of the lower flat of the county court house "into a Record office, and such other public offices and rooms as the County Council may deem necessary and advisable"; and gave such Council power to make an assessment on the rate-payers of the Municipality to pay the expense of making such offices and rooms.

The question submitted for our decision is, whether the City is liable to pay a portion of the expense incurred by the Municipality under the authority given by the Act, in fitting up offices for the Registrar of Deeds for the County, and for the Sheriff and Clerk of the Peace, respectively.

It was assumed, and no doubt correctly, that the words "Record office" meant the office of the Registrar of Deeds; and

1884. it was admitted that at the time of the passing of the Act above mentioned, the office of Registrar of Deeds was kept in a building upon land belonging to the Provincial Government, and that in the year 1881 the Government notified the Municipality that they (the Government) would require the ground on which the Registry office then stood. It was also admitted that that office was not a suitable building for the purpose, and that some arrangements were necessary for a new Registry office, but that no communication on the subject had taken place between the County Council and the City corporation.

THE MUNICIPALITY OF YORK  
v.  
THE MAYOR,  
ETC., OF THE  
CITY OF FREDERICTON.  
—  
Allen, C. J.

It is clear that the Act which authorizes the construction of these offices imposes no liability on the City to pay any part of the expense; and, therefore, if there is any such liability, it must be found elsewhere; and the Act 42 Vic., cap. 41, relating to the Administration of justice in the County of York, was relied on for that purpose.

The 4th section of that Act declares (*inter alia*) that "All sums paid for repairing the county buildings, and insuring the same, and providing the same with fuel and light, and all other expenses incurred in connection with the gaol, court house and other county buildings, and all other sums necessarily payable on account of the administration of justice in the County, \* \* \* shall be paid by the City of Fredericton and the Municipality of York jointly, in the proportion of one-third to the City and two-thirds to the Municipality."

The 7th section directs that the auditor of the Municipality shall annually make up a statement of all moneys paid by the County on account of the administration of justice, and deliver the same to the City Council, who shall, on or before the 1st February in each year, agree with the County Council upon the amount to be paid by the City toward the expenses of administering justice in the City, in pursuance of the provisions of the Act, and that the City Treasurer shall, within a month thereafter, pay to the Secretary-Treasurer of the County the amount so determined upon.

The expense of fitting up these offices cannot come under the head of "the administration of justice"; and unless it comes within the words "repairing county buildings," or "other expenses incurred in connection with county buildings," there

is no liability imposed on the City to contribute toward the expense. 1884.

I think there is no doubt that the Registry office is a County building. See Consol. Stat. cap. 74. But the words of the Act 42 Vic., cap. 41, do not extend to the expense of erecting county buildings; and the work done by the Municipality under the authority of the Act 45 Vic., cap. 65, was practically the building of new offices for the Registrar of Deeds, and for the Sheriff and Clerk of the Peace, and not the repairing of any existing county buildings. The words "other expenses incurred in connection with," etc., must be construed in reference to the word "repairing," which precedes them, and must be limited to expenses of the like kind, and would not extend to expenses of a larger character than repairs.

Acts which impose taxes are to be construed strictly, and the language must be clear and unambiguous. Wilberforce on Statutes, 244. In *Partington v. The Attorney General* (1), Lord Cairns says: "As I understand the policy of all fiscal legislation, it is this: if the person sought to be taxed comes within the letter of the law, he must be taxed, however great the hardship may appear to be. On the other hand, if the Crown (and the same rule would apply to a Municipality), seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of the law the case might otherwise be. In other words, if there be admissible in any statute what is called an equitable construction, certainly such a construction is not admissible in a taxing statute, where you can simply adhere to the words of the statute."

I think, equitably, the City ought to pay a portion of the expenses of fitting up the Registry office and the Sheriff's office; but the Act 45 Vic., cap. 65, has not required them to do so; and the liability imposed on the City by the 42 Vic., cap. 41, to pay a portion of the expenses incurred in connection with the county buildings does not reach this case.

I am free to admit the necessity of having safe and suitable offices for the Registrar of Deeds and for the Sheriff, and I think the County Council acted wisely in utilizing the lower

THE MUNICIPALITY OF  
YORK  
v.  
THE MAYOR,  
ETC., OF THE  
CITY OF FREDERICTON.  
—  
Allen, C. J.  
—

1884. flat of the court house for those offices ; and as the City is as  
 THE MUNICIPALITY OF YORK much interested as the County in the matter, they undoubtedly ought to bear a portion of the expense ; but the question is not, what the City *ought* to do, but what is it *legally liable* to do. I reluctantly decide the question in favor of the City.  
 THE MAYOR, ETC., OF THE CITY OF FREDERICTON.  
 Allen, C. J. PALMER and KING, JJ., agreed with the learned Chief Justice.

WELDON, J. I am of opinion the officer holding the situation of Registrar of Deeds and Wills should be provided with an office and vault for the security of deeds and registry books of the County, and if it cannot be provided for in the county Court house, the Municipality should provide an office for the same, that the records may be safely kept, and not subject to be destroyed by fire. A more important office to the inhabitants of the County, wherein titles to their freeholds are registered, is not kept in the County. As the Sheriff has charge of the court house and gaol of the County, his office should be kept near thereto ; and in the court house recently erected his office is provided for in the building. The law requires the Sheriff or a deputy to reside at the shire town, and being an important officer in the administration of criminal justice, he is entitled to be provided with an office in the county buildings. The Clerk of the Peace, if not provided with an office and vault, should have at least a safe in which to keep the records of his office. He has to record all marriages, which is a public record of the County, and should be kept safely.

It is a convenience to the inhabitants of the County that all the County offices should be kept at or near the Court house, and therefore the Municipality of the County are acting in the interest of the inhabitants, whom they represent, in providing for the safe keeping of the records of the County confided to them, and the expense of so doing is properly a County charge. I am therefore of opinion that the Acts of Assembly fully authorized them to provide for their safe keeping, and that they were justified in providing for the same in the Court house.

The Sheriff is a most important officer in the administration



of public justice, and without such an officer it would be difficult for the business of the County to be carried on. In fact, all the officers named are County officers, and the County should provide offices for them.

The County, in providing in the County court house vaults for the secure keeping of the records kept by these officers, exercised a due regard to economy; and as the market, which the people of the County are to have free from tolls, saves the expense thereof, while the City Council are authorized to impose tolls in their city hall, and the County have preferred to so compensate for using the Court house for offices, the City have no cause of complaint for the Municipality utilizing the vacant space in the Court house for the meetings of the County Council, instead of taxing the County for the erection of a building to hold these sittings.

I am therefore of opinion that the defendants are liable by law for one-third of the expenses incurred, as set forth in the special case.

WETMORE, J. I am of opinion that the City is clearly liable for one-third of the expense in fitting up the Record office and vault for the Registrar of Deeds; but have doubts as to their liability for the expenditure in fitting up offices for the Sheriff and the Clerk of the Peace.

*Judgment for defendants.*

1884.

THE MUNICIPALITY OF YORK

v.  
THE MAYOR, ETC., OF THE CITY OF FREDERICTON.

Weldon, J.

1888.

## HERRINGTON v. McBAY.

*November 3.*

*Slander—Charge of stealing trees—Sense in which the words were used—Ownership of the trees—Proof of value—Improper admission of immaterial evidence—Misdirection—New trial.*

If words *prima facie* importing felony are used in a different sense, they are not actionable.

Defendant finding plaintiff cutting trees on land claimed by him, charged the plaintiff with stealing. The charge was made in the presence of the plaintiff's brother, who knew that it related to the cutting of the trees, and that the plaintiff also claimed them:

*Held*—that the words used imported a charge of trespass, and not a felony. In an action for slander in charging plaintiff with stealing trees, evidence is admissible on the part of the defendant to shew that the trees were not worth \$25—the amount required by the Rev. Stat. c. 164, sec. 18, to make the cutting of trees, with intent to steal, a felony.

This was an action for slander, tried before Mr. Justice Tuck at the Kings Circuit, in February, 1887. Verdict for the defendant.

June 18, 1887. *L. A. Currey* moved for a new trial.

*M. McDonald*, contra.

*Cur. adv. vult.*

The judgment of the Court (PALMER, J., taking no part) was now delivered by

ALLEN, C. J. This is an action for slander, in which the defendant is charged with speaking the following words to the plaintiff, in the presence and hearing of his brother, Frederick Herrington: "You are pilfering and stealing, and always at it"—meaning thereby that the plaintiff was guilty of larceny. The defendant pleaded, not guilty; and a verdict was found in his favor.

A new trial was moved for on the following grounds: 1. The improper admission of evidence; (a) of the value of the trees cut by the plaintiff; (b) of the ownership of the trees cut; (c) that a prosecution had been brought by the defendant against the plaintiff for trespass. 2. Misdirection on the question of slander.

At the trial, the plaintiff stated on cross-examination that he and his brother were cutting wood on land which he supposed belonged to their father, and that the defendant came to them and said: "Don't you think you are doing pretty well?" That he also said that the trees they were cutting belonged to him; that he had bought them from one Kimball; and then he used the words, "You are pilfering and stealing, and always at it." The evidence of the plaintiff's brother was substantially the same.

1888.  
HERRINGTON  
v.  
MCBAY.  
—  
Allen, C. J.  
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We think the evidence as to the ownership and value of the trees was admissible, to enable the jury to find whether the words "pilfering and stealing" were used in their ordinary signification, or whether the defendant only intended to charge the plaintiff with committing a trespass in cutting the trees.

In *Odgers on Slander*, 107, it is said that the defendant in such actions is allowed to give evidence of all the surrounding circumstances, in order to place the jury, so far as possible, in the position of by-standers, that they may judge how the words would be understood on the particular occasion.

In *Lord Cromwell's case* (1), it is said: "If a man brings an action for calling the plaintiff murderer, the defendant will say that he was talking with the plaintiff concerning unlawful hunting, and the plaintiff confessed that he had killed several hares with certain engines; to which the defendant answered and said: "Thou art a murderer" (innuendo, the killing of the said hares). Resolved by the whole Court, that the justification was good; for in case of slander by words, the sense of the words ought to be taken, and the sense of them appears by the cause and occasion of speaking of them; for "*sensus verborum ex causa dicendi accipiendus est, et sermones semper accipiendi sunt secundum subjectam materiam.*"

In *Thompson v. Bernard* (1), the words were: "Thompson is a damned thief, and I can prove it." But the defendant added that Thompson had received the earnings of a ship, and ought to pay the wages. The witness, to whom the words were addressed, had been master of a ship belonging to a person deceased, and who had appointed the defendant his executor. Lord Ellenborough nonsuited the plaintiff, observing that

(1) 2 Coke 282.

(1) 1 Camp. 48.

1888. the word "thief" was used by the defendant without any intention to impute felony to the plaintiff, the latter words qualifying the former.

HERRINGTON

v.  
McBAY.

Allen, C. J.

In the present case, the words were spoken to the plaintiff when he was in the act of cutting trees which the defendant claimed as his property, and he said in effect to the plaintiff, "In cutting those trees, you are pilfering and stealing." We think the jury, under these circumstances, would be justified in finding that the whole of the defendant's words, taken together, imported only a charge of trespass.

Cutting down trees growing upon land, and carrying them away wrongfully, is only a trespass by common law; and the 18th section of cap. 164 of the Rev. Stat., which makes it a felony to cut down trees with intent to steal them, only applies where the value of the trees, or the damage done, exceeds \$25. Therefore, we think that the evidence of the value of the trees, cut by the plaintiff on the occasion when the defendant used the words, was relevant to shew that he did not intend to charge the plaintiff with doing a felonious act.

But we do not think the evidence that the plaintiff had been summoned before a Justice of the Peace and fined for cutting the trees was relevant to the issue in this case, which was, whether the words, if used by the defendant, could be understood as charging the plaintiff with a felony. It does not necessarily follow, however, that a new trial must be granted because improper evidence has been received, if such evidence was wholly immaterial, as it appears to have been in this case. *Carter v. Saunders* (1); *McKenzie v. Scovil* (2); *Bryson v. Hamilton* (3).

The substantial ground of misdirection was telling the jury that they could consider what the defendant meant to convey by the words used.

In *Hankinson v. Bilby* (4), it was held that the use of words imputing an indictable offence was actionable or not, according to the sense in which they might fairly be understood by by-standers not acquainted with the matter to which they related, and that the secret intent of the speaker in uttering them was immaterial.

(1) 6 All. 147.  
(2) 2 Han. 6.

(3) Stev. Dig. 923.  
(4) 16 M. & W. 442; 2 C. & K. 440.

1888.

HERRINGTON  
v.  
McBAY.

The words alleged to have been spoken by the defendant in this case were spoken to the plaintiff and his brother on one occasion, and to his father on another occasion, each of whom must have known that they related to the cutting of the trees — indeed, the father admitted on cross-examination that the defendant asked him whether he thought his sons were doing right in cutting the trees; and added that they were pilfering and stealing out there (that is, at the place where they were cutting the trees), and taking what did not belong to them.

Now, though a person unacquainted with the matter to which the words related might understand that the defendant intended to charge the plaintiff with the crime of stealing, neither his father nor brother could reasonably have understood that he intended to charge anything more than a trespass.

There are some expressions in the learned Judge's direction to the jury which would probably be erroneous. Thus, in speaking of the circumstances under which the words were used, he said: "Taking into consideration all the circumstances of the case, did the defendant mean to charge the plaintiff with being a thief generally?" But in a subsequent part of the direction he said: "When the conversation took place, what did he (defendant) mean to convey? and what did the parties understand it to mean? You cannot get at the inner thoughts of the man, but in such cases you must take what was said, in connection with all the surrounding circumstances, in order to arrive at what was the impression likely to be made, and what it was he intended others to receive from what he said."

If the persons in whose presence the words were spoken had been strangers to the dispute between the parties as to the ownership of the trees which the plaintiff was cutting, we think that part of the direction which related to the intention with which the defendant used the words would have been incorrect; but as the plaintiff's father and brother knew that the defendant was claiming that the plaintiff was cutting trees which belonged to him (defendant), and that the words were spoken in reference to the cutting; and as it was also left to the jury to say what the plaintiff's father and brother understood the defendant's language to mean, we think the case comes within

1888. the rule laid down in *Hankinson v. Bilby*, and that the ver-  
dict ought not to be disturbed. In that case the words were:  
HERRINGTON v. "You are a thief. You get your living by it. You have  
McBAY. robbed Mr. L. of £30, and would have robbed him of more,  
only you were afraid." The words were spoken in the pres-  
ence of several persons, as well as the witness who was called  
to prove them. The witness knew that the words referred to  
a distress which had been made on the plaintiff by Mr. L., for  
which the plaintiff had brought an action, which L. settled by  
paying £30; but the other persons present did not know to  
what the defendant's words referred. Parke, B., said: "The  
witness appears to have been well acquainted with the affair  
to which the words related. If the by-standers were equally  
cognizant of it, the defendant would have been entitled to a  
verdict."

If there was no misdirection in this case, nor any evidence improperly admitted, there is an additional reason why the verdict should not be disturbed. The defendant denied the speaking of the words charged; and this question was left to the jury, who may have believed him and given their verdict accordingly. But we cannot tell on what ground they found their verdict; and therefore if there was any material evidence improperly admitted, or the direction on the other question was wrong, a new trial should be granted; but for the reasons already stated, we think there was no material evidence improperly received, and that the direction was substantially correct, under the circumstances.

Admitting, however, that the direction was not strictly accurate, we think a new trial should not be granted, because, in view of the case of *Hankinson v. Bilby*, we think the verdict should properly have been found for the defendant. In *Merivale v. Carson* (1), which was an action for slander, Lord Esher, M. R., said: "Even if I thought the right direction had not been given to the jury, I should have declined to grant a new trial, for the same verdict must inevitably have been found if the jury had been rightly directed."

*New trial refused.*

## LEGGETT ET AL V. YOUNG.

1888.

February 11.

*Sale of goods by sample—Articles of food—Implied warranty.*

The defendant, a manufacturer of canned goods in this Province, sent to the plaintiff, in New York, samples of his goods, which the plaintiff acknowledged the receipt of, stating that they were satisfactory and ordering a quantity at the price named by the defendant, which he paid. When the lobsters were received by the plaintiff, soon after the order given, they were found on examination to be of bad quality and unfit for food. In an action for breach of warranty:

*Held*—That there was an implied warranty that the lobsters supplied were merchantable and fit for food.

This was an action for breach of warranty in a contract for the sale of 320 cases of canned lobsters by the defendant: tried before His Honor the Chief Justice at the Saint John Circuit, in May, 1887.

The declaration contained three counts. The first count stated that the defendant, by warranting that certain cans of lobsters were equal in quality and description to a sample previously shown, sold them to the plaintiffs. Breach, that the lobsters were not equal in quality and description to the sample; whereby the plaintiffs lost the price paid for them, the cost of transporting them from Bathurst in this Province, to New York, certain duties paid, and the profit which would otherwise have accrued to them.

The second count alleged that in consideration of an agreement by the defendant to furnish a certain quality of cans of lobsters to the plaintiffs, equal in quality and description to a sample before then shown by the defendant, the plaintiffs relying upon that agreement and undertaking bought the lobsters from the defendant. Breach, that the lobsters furnished by the defendant were not equal, but were inferior, in quality and description to the sample; alleging special damages as in the first count.

The third count stated that the defendant by warranting that certain cans of lobsters were reasonably fit and proper to be used for food then and after keeping the same for a reasonable time, sold the lobsters to the plaintiffs to be used for the

1888. purpose named. Breach, that the lobsters were not then  
LEGGETT reasonably fit and proper to be used for food ; alleging special  
v. damages, as in the first count.  
YOUNG.

At the trial, leave was granted to the plaintiffs to add a fourth count, alleging a warranty that the lobsters furnished were of a good and merchantable quality, and averring as a breach that they were wholly bad and unmerchantable: alleging special damages as before.

The defendant pleaded: 1st. That he did not warrant the lobsters, as alleged. 2nd. That at the time of the sale, the lobsters were equal in quality and description with the sample. 3rd. That he did not undertake and promise as alleged.

It appeared at the trial that the plaintiffs were grocers carrying on business in New York, and that the defendant was a manufacturer of canned lobsters in this Province, having two canning factories in the county of Gloucester, one at Caraquet and the other at Shippegan. That in March, 1884, a correspondence was opened between the parties for the sale of a certain quantity of canned lobsters by the defendant to the plaintiffs, the defendant having sent them samples of his canning, which they acknowledged the receipt of, stating that they were quite satisfactory, and ordering a certain number of cases at the price named by the defendant. The lobsters were to be delivered by the defendant at the Bathurst station of the Intercolonial Railway, whence they were to be forwarded to the plaintiffs, *via* St. John and Boston.

In August, the defendant delivered a car load of cases of lobsters at the Bathurst station for the plaintiffs, which they received in due course, and disposed of part of them to their customers ; some of which were returned to them as being of bad quality, and for others they refunded to the purchasers the amounts which had been paid for them.

After discovering the condition of the lobsters, the plaintiffs wrote to the defendant expressing their disappointment in the quality of the lobsters, and stating that they had purchased them entirely on his representation of their fine quality, and had paid his draft relying on the samples he had sent them ; and that it placed them (plaintiffs) in an unpleasant position



with their customers, to find out that the lobsters were not as they had represented them.

1888.

---

LEGGETT  
v.  
YOUNG.

The correspondence between them continued through the autumn of 1884, down to February in the following year; the plaintiffs complaining that the lobsters were not according to the sample sent to them by the defendant, and on the faith of which they had purchased, and that they were unmerchantable, unsound and unfit for use, and must have been bad when packed. They also offered to return them to the defendant and claimed that he should repay them the amount they had paid him, and also the duties and freight they had paid.

The defendant in answer to the plaintiffs' letters denied all liability, and stated that the lobsters were sound and merchantable when shipped to them, and that if they turned out badly, it was not because they had been improperly canned, but arose from other causes over which he, as the shipper, had no control.

The plaintiffs gave evidence at the trial that after the complaints were made to them by the persons to whom they had sold some of the lobsters, they had opened a number of the cans, and found them dark colored and unfit for food, and many of them smelling so offensively that the Board of Health ordered them to be removed from the plaintiffs' warehouse and destroyed; which was done with the exception of ten cases which the plaintiffs kept, and afterwards brought to St. John, where they were opened and examined by the jury during the trial. Several of the witnesses—owners of canning factories, and skilled in the canning of lobsters—gave it as their opinion that the lobsters in question had been defective at the time they were canned, as the cans in which they were packed were, with very few exceptions, in good condition, and there being nothing to indicate that the lobsters had become tainted in consequence of any defect in the cans; and that lobsters when properly canned, would keep in good condition for several years.

The defendant gave evidence by the foreman and packer at his factory at Caraquet, and by several of the persons employed there in canning lobsters, that all the lobsters canned there during the season of 1884, were sound and in good condition when canned. There was no such evidence

1888.

---

LEGGETT  
v.  
YOUNG.

respecting the canning at the Shippegan factory—the foreman and packer there having left the Province—and the practice being to send the lobsters canned at Shippegan to the Caraquet factory, whence the pack of both factories was sent to Bathurst to be forwarded—there being nothing to shew which factory they came from.

The Chief Justice directed the jury that the defendant being a manufacturer of canned lobsters and selling them by sample, was bound that the stock of goods which he supplied to the plaintiffs under his agreement was equal to the sample in every respect; that is, that they would be substantially of the same portions of the lobster as the samples were, and also that they would be merchantable and fit for food. It was absolutely essential that they should be fit to be eaten, and if they were not, that it was a breach of the defendant's implied warranty. Whether there was an express warranty or not of the quality of the lobsters, was not perhaps of much importance; but at all events there was an implied warranty by the defendant that the goods he undertook to furnish the plaintiffs were of good merchantable quality, and fit to be eaten as food, and if they were not so, there clearly was a breach of warranty. Whether the lobsters were fit for food or not, and whether they were merchantable goods or not, was the principle contest between the parties. The plaintiffs did not complain so much that the better portions of the lobsters were not in the cans sent to them—perhaps it might be said that they did not complain of this at all—but that the lobsters were unsound and unfit to be eaten when they got them. That was the first question for the jury to determine. Did they believe that when the lobsters arrived in New York, and were opened and examined, they were in the condition represented by the plaintiffs? If that was the fact, of course they were totally unfit for food, and unmerchantable, and not the articles which the defendant either expressly or impliedly agreed to furnish the plaintiffs with.

The next question was whether the lobsters were in a good, sound condition when canned by the defendant; or were they then in the bad condition described by the plaintiffs' witnesses when opened and examined in New York. If they were in

such bad condition then, it was difficult to believe that they could have been sound when they were canned, as some of the witnesses stated that if properly canned they would keep in good condition for several years.

The jury found a verdict for the plaintiffs for \$2,072.

1888.  
LEGGETT  
v.  
YOUNG.

February 10, 1888. *Barker, Q. C.*, now moved for a new trial.

1st. It was misdirection to tell the jury that there was a warranty that the goods were according to the sample. 2nd. In directing the jury that there was an implied warranty that the lobsters were merchantable, and fit for food. If a party sells to another articles of food, there is not necessarily an implied warranty that they are merchantable, or fit for food. When they are sold by sample, still less is there an implied warranty. [ALLEN, C. J. Since the trial of this case, *Drummond v. Van Ingen*, (1) before the House of Lords, has been reported. That case seems to fully justify my direction to the jury.]

*Seely, contra.*

*Barker, Q. C.*, in reply.

The following authorities were referred to by the defendant's counsel: Addison on Contracts, 495; Benjamin on Sales, secs. 663, 667; *Ormrod v. Huth* (2); *Burnby v. Bollett* (3).

*Cur. adv. vult.*

On the following day, the Court delivered judgment refusing a new trial, and stated that *Drummond v. Van Ingen* was a clear authority in favor of the plaintiffs.

*New trial refused.\**

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(1) 12 App. Cas. 284.

(2) 14 M. & W. 651.

(3) 16 M. & W. 644.

\* See also *Jones v. Bright*, 5 Bing. 533; *Jones v. Just*, L. R. 3 Q. B. 197; *Spurr v. Albert Mining Co.*, 2 Han. 361; *Randall v. Newson*, 2 Q. B. D. 102.



# INDEX.

**ABANDONMENT**—Notice of—Acceptance of notice.....510  
See INSURANCE. 2.

**ACCOUNT**—Suit for—Objection for want of parties, when taken.....340  
See CHOSE IN ACTION.

**ADMIRALTY CHARTS**—Names and location of places—Judicial notice of.....510  
See INSURANCE. 2.

**ADMISSIONS**—Action against Sheriff for escape—Statements of debtor before his escape as to fraudulent conveyance—Admissibility of.....449  
See SHERIFF.

— Correspondence between parties with view to settlement of claim—Where no agreement to be without prejudice—Evidence..273  
See BILL OF SALE.

**AFFIDAVIT**—To hold to bail—Arrest after action brought—Before whom affidavit sworn—Consol. Stat., c. 38, sec. 2—Necessary allegations in affidavits.] An affidavit to hold to bail after the commencement of an action by writ of summons and before judgment, may be sworn before the plaintiff's attorney. (ALLEN, C. J., *dubitante*).

Such affidavit need not state the reasons for the deponent's belief that the defendant is about to leave the Province.

Where a verdict was obtained in the action against the escaped debtor before his arrest under cap. 38, Consol. Stat., the affidavit to arrest him should state, as the cause of action, the claim for which the action was brought against the debtor.

Though the affidavit to hold to bail may be irregular, it is not a defence to an action against the sheriff for an escape from arrest under the capias issued upon it. MCMANUS v. WELLS.....449

— To hold to bail—Statement of cause of action—Certainty of.....531  
See PRACTICE. 2.

**AGENT**—Foreign Insurance Company—Power to cancel policies.....501  
See INSURANCE. 1.

**ALTERATION**—Bill of exchange—Line through drawer's name by pen-mark—Whether a material alteration.....420  
See BILL OF EXCHANGE.

**AMENDMENT**—Notice of motion for new trial—Adding new ground.....370  
See PRACTICE. 3.

**ANIMALS**—Mischievous—Dog killing sheep—Liability of owner of dog.....268.  
See MISCHIEVOUS ANIMAL.

**APPEAL**—Conviction for fishing during close season—Right of appeal to Minister of Marine and Fisheries—Whether certiorari taken away.....271  
See FISHERIES ACT. 1.

— Decision on demurrer in Equity—Where not appealed from—*Res judicata*.....340  
See CHOSE IN ACTION.

— Equity—Service of notice.....560  
See PRACTICE. 6.

**ARREST**—Of debtor—After judgment on original claim.....572  
See JUSTICE'S COURT.

— For taxes already paid—Notice of assessment—Liability of corporation for illegal arrest on execution issued by its officers—Execution to levy on goods, or, in default imprisonment—Arrest without searching for goods—Excessive damages.....24  
See FALSE IMPRISONMENT.

**ASSESSMENT**—For taxes—Notice of, addressed to wrong person—Arrest of party assessed for non-payment of taxes.....24  
See FALSE IMPRISONMENT.

**ASSIGNMENT**—Chose in action—Equitable interest.....340  
See CHOSE IN ACTION.

**ATTACHMENT**—For contempt—Consol. Stat., c. 38, sec. 22.....205.  
See DEBTOR.

**BAIL**—Affidavit to hold to—Arrest after action brought—Necessary allegations in affidavit.....449  
See AFFIDAVIT.

**BAIL**—Continued.

—Affidavit to hold to—Statement of cause of action—Certainty of.....531  
See PRACTICE. 2.

**BIAS**—Disqualification by relationship—Justice of the Peace.....543  
See CANADA TEMPERANCE ACT. 4.

**BILL OF EXCHANGE**—*Bill of Exchange—Action by drawer against acceptor—Line through drawer's name by pen-mark—Whether a material alteration.*] Action by drawer against the acceptor of bill of exchange payable to drawer's order. When the bill was offered in evidence, the drawer's name showed that a line had been drawn through it with a pen. No evidence was given to explain it, and the defendant on presentment for payment did not deny his liability.

*Held*—WETMORE, J., dissenting)—that the mark through the drawer's name did not amount to an alteration of the bill, and that the defendant was liable. ISAACS V. GROTHE. ....420

—Delivered to bank to discount—Right of bank to appropriate proceeds in payment of indebtedness of party.....564  
See TROVER. 1.

**BILL OF SALE**—*Engine in mill—Substitution of new for old engine—Bill of sale to vendor of new engine to secure purchase money—Knowledge of grantee of old engine—Trove for old engine against vendor of new engine—Estoppel—Correspondence with view to settlement of claim—Admissions without prejudice—Evidence.*] In 1884, S. held a registered mortgage bill of sale of a steam engine owned and used by C. in his mill. In April, 1887, C. purchased another engine from M., who took the old engine in part payment, and a bill of sale of the new engine as security for the balance. The new engine was put in the mill and the old one taken out and sent to M., without S.'s knowledge. In June, 1887, S. was told by C. that he had made the exchange of engines with M., to which S. made no objection. The mill was afterwards burnt, whereupon S. took possession of the new engine, claiming it under his bill of sale. M. also claimed it under his bill of sale. After some correspondence between S. and M., S. paid M. the amount due him by C., and M. discharged his bill of sale.

In an action of trover by S. against M. for the old engine:

*Held* by WETMORE, KING and TUCK, JJ., 1. (ALLEN, C.J., and PALMER, J., dissenting), That S. was not estopped from claiming the old engine under his bill of sale.

**BILL OF SALE**—Continued.

2. That the correspondence between the parties with a view to a settlement was admissible, there being no express or implied agreement that the correspondence was to be without prejudice. STEWART V. MUIRHEAD. 273

**BOARD OF VALUATORS**—Statute providing for appointment of three—Power of two to act.....217

See MUNICIPAL CORPORATION. 3.

**BOND**—Action on—Where given in settlement of suit against indorsers of note—Defence that indorsement was forged to plaintiff's knowledge—Evidence.....462

See EVIDENCE.

**BRITISH NORTH AMERICA ACT**—Effect of sec. 92 on Provincial Railway Company—Limitation of Actions.....588

See RAILWAY COMPANY. 2.

—Right of Local Legislature to prohibit sale of spirituous liquors.....113

See LIQUOR LICENSE ACT.

**CANADA TEMPERANCE ACT**—51 Vic., c. 34—*Form of information—When imperative—Conviction as for a first offence—Whether previous conviction must be charged.*] An information for an offence under The Canada Temperance Act may be either in the form (A) given by the Summary Convictions Act, or in form (B) given by the Act 51 Vic., cap. 34.

It is not necessary to sustain a conviction as for a first offence under sec. 115, sub-sec. (c.) of The Canada Temperance Act, that a previous conviction should be charged. *Ex parte* KELLY. ....130

2—*Conviction—Costs of commitment and conveying defendant to gaol.*] A conviction under The Canada Temperance Act may include the costs and charges of the commitment and conveying the defendant to gaol in default of distress. *Ex parte* SHEHAN. ....133

3 *Conviction—Costs of commitment and conveying defendant to gaol—Costs of distress.*] In a conviction under The Canada Temperance Act for a first offence of unlawfully selling intoxicating liquor, the costs of commitment and conveying the defendant to gaol if the fine and costs are not levied by distress are in the discretion of the Justice under sec. 66 of The Summary Convictions Act.

Where such costs are not awarded, they should not form part of the conviction in the

**CANADA TEMPERANCE ACT**—Continued.

form (J 1) given by the Summary Convictions Act, which admits of variance.

Form (T) given by the Act 51 Vic. cap. 34, is not applicable to a case where the Justice does not adjudge payment of the costs of commitment and conveying the defendant to gaol.

The costs of a distress are not in the discretion of the Justice under sec. 66 of the Summary Convictions Act. *Ex parte* WHALEN. .... 144

4—*Justice of Peace—Disqualification by relationship—Bias—By whom informations laid—Third offence—Presence of defendant at trial—Amendment of Act after first conviction—Keeping for Sale—Evidence.*] Where the interest of a Justice of the Peace in a summary prosecution tried before him is not pecuniary, it must, in order to disqualify him, be such a substantial interest as to make it likely that he had a real bias. Mere relationship to the prosecutor is not sufficient.

A number of persons, including one N., were associated together to aid in enforcing the Canada Temperance Act. N., being furnished with money by a member of the association, purchased intoxicating liquor, in order to enable him to lay informations and prove the illegal sale. The information was in fact laid by a policeman, at the request of members of the association, who furnished funds to carry on the prosecution. The conviction of the defendant was made on the evidence of N., who was a cousin of the Justice.

*Held—(WETMORE, J., dissenting)*—That his relationship to N. did not disqualify the Justice from trying the information.

It is not necessary that prosecutions for violation of the Act should be brought by or in the name of the Collector of Inland Revenue of the district where the offence is committed.

A defendant who is not present at the trial, but is represented by an attorney, may be convicted of a third offence: following *Ex parte Groves*, 23 N. B. Rep. 38.

Evidence of a sale of intoxicating liquor will sustain a conviction for keeping liquor for sale.

A conviction under sec. 99 of the Canada Temperance Act for illegally keeping intoxicating liquor for sale, is not affected by the repeal by 51 Vic., cap. 34, sec. 5 of the 4th sub-sec. of sec. 99, which relates to sales for medicinal or manufacturing purposes. *Ex parte GRIEVES*. .... 543

**CAUSE OF ACTION**—Statement of, in action by client against solicitor for negligence in conducting a suit. .... 620

See SOLICITOR AND CLIENT.

**CAUSE OF ACTION**—Continued.

—Statement of in affidavit to hold to bail  
—Certainty of ..... 531

See PRACTICE. 2.

—Statement of in affidavit to hold to bail after action brought ..... 449

See AFFIDAVIT.

**OERTIORARI**—Conviction for fishing salmon during close season—Right of appeal to Minister of Marine and Fisheries. .... 271

See FISHERIES ACT. 1.

**CHARTS**—Admiralty—Judicial notice of geographical position and names of places. 510

See INSURANCE. 2.

**CHOSE IN ACTION**—*Assignment of—Equitable interest—Negotiable instrument—Trustee and Cestui que trust—Parties to suit for an account—Objection for want of, when taken—Appeal—Res judicata.*] C. being the holder of a policy of insurance, on which he had brought an action, assigned his interest therein to the defendant to secure him for advances made to, and liabilities incurred for C. Afterwards C., being indebted to B., drew an order on defendant, directing him to hold the balance of the money received by him on account of the insurance, after paying the amount owing to himself, to the order of B., to whom he had assigned it. This order was presented by B. to the defendant, who accepted it by writing his name across the face of it. B. being indebted to the plaintiff, indorsed and delivered the order to him, and assigned to him all his (B.'s) interest, legal and equitable, in the balance of the insurance money. Notice of this assignment was given to the defendant, who agreed to hold the money, when received, till the rights of claimants could be determined, but afterwards declined to be bound to hold the money. The plaintiff then filed a bill for an account of the claims against the fund prior to the assignment to him, and for a decree that the balance in the hands of the defendant, after the payment of such prior claims, should be paid to him. The defendant demurred to the bill, on the ground that the assignment from C. to him, though absolute on its face, was only given as security for payment of a debt, and therefore that C. was a necessary party to the suit. The demurrer was over-ruled, and the judgment was not appealed from. Afterwards, on the hearing of the case, the defendant claimed to renew the objection that C. should have been a party to the suit, but it was

**CHOSE IN ACTION**—Continued.

rejected, and the case was heard on the questions arising upon the assignment to the plaintiff, and a decree was made in his favor.

*Held*, on appeal, 1. That even if C. was a necessary party to the suit for an account, that question having been determined on the demurrer, and not appealed from, could not be renewed on the hearing of the case.

2. That though the order drawn by C. on the defendant was not a negotiable instrument, his writing his name across the face of it amounted to his assent to the terms of it, and therefore that he held the balance of the fund for B., and that the plaintiff, as the assignee of B., had an equitable right to that balance in the defendant's hands.

3. That the plaintiff not having knowledge of any outstanding equitable rights between B. and C., would not be affected by any such equitable rights. *McKEAN v. JONES*....340

**CIVIL RIGHTS**—Power of Parliament of Canada to legislate in respect to limitation of actions—British North America Act....588

See RAILWAY COMPANY. 2.

**CLOSE SEASON**—Salmon fishing—Conviction for violation of Act—Evidence....271

See FISHERIES ACT. 1.

**COMMITMENT**—Costs of—Conviction under Canada Temperance Act .... 133, 144

See CANADA TEMPERANCE ACT. 2 and 3.

**CONFESSION**—Judgment by—Application to set aside as fraudulent—Delay...635

See JUDGMENT.

—Judgment by—Power of Justice of Peace to sign judgment in absence of parties...572

See JUSTICE'S COURT.

**CONTEMPT**—County Court Judge—Dominion Controverted Elections Act—Prohibition—Order *Nisi* with stay of proceedings—Disregard of by County Court Judge—Costs.] A writ of prohibition will be granted to restrain a County Court Judge from proceeding under the Rev. Stat. of Canada, cap. 9, relating to Controverted Elections, in a matter where he is acting in excess of his jurisdiction.

Where a Judge of this Court had granted an order *nisi* for a prohibition to restrain a County Court Judge from proceeding to recount the votes given at an election for a member of the House of Commons under the Rev. Stat. of Canada, cap. 8, sec. 64, with a stay of proceedings until the return of the order *nisi*, it is a contempt of this Court for the County Court Judge to proceed with the re-count.

**CONTEMPT**—Continued.

Where the County Court Judge shewed that he acted under the belief that the 64th sec. of the Act required him to proceed as he did, and that he did not intend to act contemptuously, and the prosecutor for the prohibition did not claim costs, no punishment was awarded for the contempt. *Ex parte BAIRD: In re STRADMAN*.....200

—Attachment for—Refusal of witness to give evidence where debtor not served with order for his examination under Consol. Stat. c. 38.....205

See DEBTOR.

**CONTRACT**—Appointment of valuers by Municipal Council—Wrongful dismissal—Action for breach of contract—Pleading..217

See MUNICIPAL CORPORATION. 3.

**CONTRIBUTORY NEGLIGENCE**—Negligent construction of Railway bridge—Workman crossing it contrary to directions with notice of the danger—Injury to workman—Whether Railway liable.....425

See RAILWAY COMPANY. 4.

—Negligently running of train burning wood—Consequent burning barn, small part of which within line of land taken by Railway—Hay exposed below sills—Whether plaintiff taking no means to protect the hay evidence of contributory negligence to go to the jury .....644

See RAILWAY COMPANY. 1.

**CONTROVERTED ELECTIONS ACT**

—(Consol. Stat., cap. 5)—Form of Petition—Service on Respondents—How return should be made.] A petition under The Controverted Elections Act (Consol. Stat., cap. 5), need not shew on its face that it was presented within the time limited by the Act; it is sufficient if Form (A), prescribed by the Act, is adopted.

It is not necessary that the return of the service of the duplicate petition should be made through the office of the sheriff of the county in which it is served. *RYAN*, petitioner, and *TURNER AND LEWIS*, Respondents ..... 634

—Dominion..... 42

See DOMINION CONTROVERTED ELECTIONS ACT.

**CONVERSION**—Bill of Exchange delivered to Bank to discount—Bank appropriating proceeds in payment of indebtedness of party .....564

See TROVER. 1.



**CONVERSION** — Continued.

— Cargo of vessel — Verdict against master — Subsequent action against the ship-owners — Whether owners can compel plaintiff to sign judgment against master.....407

See **TROVER**. 2.

— Goods under bill of sale — Substitution of new for old.....273

See **BILL OF SALE**.

— Tenants in common of chattel — Sale of interest of one co-tenant under execution.....295

See **TROVER**. 3.

**CONVICTION** — As for a first offence under Canada Temperance Act, sec. 115 (c) — Whether previous conviction must be charged.....130

See **CANADA TEMPERANCE ACT**. 1.

— Under Summary Convictions Act (R. S. C. cap. 178) — Adjudging a penalty and costs — Who entitled to receive them.....123

See **SUMMARY CONVICTION**.

**CONVEYANCE** — Voluntary — Securing maintenance and support of grantor — Whether void as against creditors.....287

See **VOLUNTARY CONVEYANCE**.

**CORPORATION** — Foreign — Proof of incorporation — Power to sue on a promissory note.....501

See **INSURANCE**. 1.

— Liability of, for illegal arrest on execution for taxes issued by its officer — Respondent superior.....24

See **FALSE IMPRISONMENT**.

— Municipal — Malice — Wrongful dismissal of officer by Council — Liability of corporation.....217

See **MUNICIPAL CORPORATION**. 3.

**CORRESPONDENCE** — With view to a settlement between parties — Admissibility of.....273

See **BILL OF SALE**.

**COSTS** — *Review of taxation — Equity appeal.* ] Where the clerk in taxing costs does not act on a wrong principle, the Court will not in general inquire into the correctness of his opinion upon a matter of fact.

A review of taxation was refused where the objectionable items were very small. **CLARK v. SCHOFIELD**.....403

**COSTS** — Continued.

— Action brought in County Court and transferred to Supreme Court — Amount recovered within jurisdiction of County Court.....116

See **PRACTICE**. 1.

— Contempt — Where costs not asked for.....200

See **CONTEMPT**.

— Conviction under Canada Temperance Act — Commitment and conveying defendant to gaol.....133, 144

See **CANADA TEMPERANCE ACT**. 2 and 3.

— Conviction under Canada Temperance — Distress — Discretion of justice.....144

See **CANADA TEMPERANCE ACT**. 3.

— Postponement of trial on usual terms of paying costs — Settlement of cause — Power of Judge to vary order so as to include costs of opposing application for postponement...119

See **PRACTICE**. 4.

— Summary Conviction Act — Who entitled to receive them.....123

See **SUMMARY CONVICTION**.

**CO-TENANT** — Tenants in common of chattel — Sale of interest of one under execution — Conversion.....295

See **TROVER**. 3.

**COUNTY** — Buildings of — Whether City in which placed liable for part of expenses of erecting.....662

See **FREDERICTON, CITY OF**.

**COUNTY COURT** — Action transferred to Supreme Court — Amount recovered within the jurisdiction of County Court — Whether certificate for costs can be granted.....116

See **PRACTICE**. 1.

— Pleading — General issue in trover...295

See **TROVER**. 3.

— Postponing trial on usual terms of paying costs — Settlement of cause after service of order — Power of Judge afterwards to vary order so as to include the costs of opposing postponement.....119

See **PRACTICE**. 4.

**COUNTY COURT JUDGE** — Prohibition — Order *nisi* — Restraining Judge from proceeding with recount of votes under Dominion Controverted Elections Act — Disregard of, by Judge.....200

See **CONTEMPT**.

**COUNTY COURT JUDGE** — Continued.

— Prohibition to restrain Judge from recounting votes—Power of Judge of Supreme Court to grant order *nisi* at chambers....162

See DOMINION ELECTIONS ACT.

**COUNTY VALUATOR**—Wrongful dismissal—Liability of corporation.....217

See MUNICIPAL CORPORATION. 3.

**DAMAGES**—Action for, against city for injury occasioned by altering level of street. 1

See MUNICIPAL CORPORATION. 2.

—Action for, against city for injury occasioned by defect in sidewalk caused by a wrong-doer.....372

See MUNICIPAL CORPORATION. 5.

—Action for, against city for injury occasioned by defective construction of sidewalk.....311

See MUNICIPAL CORPORATION. 1.

—Action for, against city for injury occasioned by sidewalk being constructed on an inclined plane.....150

See MUNICIPAL CORPORATION. 4.

—Action for, against Railway Company for neglecting to erect fences and cattle guards.....588

See RAILWAY COMPANY 2.

—Action for, against Railway Company for the burning of a barn through negligence in using a defective locomotive.....644

See RAILWAY COMPANY. 1.

— Excessive — New trial..... 24

See FALSE IMPRISONMENT.

**DEBTOR** — *Examination of, under Consol. Stat., cap. 38 — Refusal of witness to give evidence where debtor not served with order — Attachment for contempt.* A County Court Judge has no authority under the Consol. Stat., cap. 38, sec. 20, to examine a person as a witness relating to the property of a judgment debtor liable to be taken in execution, unless the debtor has been served with the Judge's order to appear for the purpose of such examination; nor is such person liable to an attachment under sec. 22, for refusing to give evidence, unless such order for the debtor to appear has been served. (Wetmore and Tuck, J.J., dissenting.) *Ex parte DAVIDSON* .....205

**DELAY**—In application to set aside a judgment by confession as fraudulent.....635

See JUDGMENT.

**DEMURRER** — Equity — Objection for want of parties — *Res judicata*.....340

See CHOSE IN ACTION.

— Equity — Time for filing.....487

See PRACTICE. 5.

**DEPOSIT**—Election Act—Delivery to and acceptance by Returning officer.....162

See DOMINION ELECTIONS ACT.

**DISCOUNT** — Meaning of.....564

See TROVER. 1.

**DISQUALIFICATION** — Relationship — Justice of the Peace..... 543

See CANADA TEMPERANCE ACT. 4.

**DISTRESS** — Costs of — Conviction under Canada Temperance Act.....133, 144

See CANADA TEMPERANCE ACT. 2 and 3.

**DISTRIBUTIONS**—*Statute of, 26 Geo. 3, c. 11; Consol. Stat., c. 78, sec. 4 — Personal property of married woman dying intestate — Husband's right to — Next of kin.* The personal property of a married woman, dying intestate, vests in her husband, *jure mariti*, to the exclusion of her next of kin. (PALMER, J., dissenting).

The right of a husband to the personal property of his deceased wife, as declared by sec. 17 of 26 Geo. 3, c. 11, is not affected by the omission of such a provision in the Consol. Stat., c. 78, sec. 4, regulating the distribution of personal property, said sec. 17 being only declaratory of the then existing law, and not conferring any new rights upon the husband. *In re CLEVELAND*... 70

**DOG**—Killing Sheep—Action against owner —Scienter.....268

See MISCHIEVOUS ANIMAL.

**DOMINION CONTROVERTED ELECTIONS ACT**—*Election Petition—Service—Power of Court to order Petition off files, where not properly served—Extending time for service — Respondent evading service.* Where a copy of an election petition, with the accompanying notices, under The Dominion Controverted Elections Act (R. S. C., c. 9), has not been properly served, the Court has power to order the petition to be taken off the files of the Court. *Rogers v. Wallace* (24 N. B. Rep. 452) followed.

The service of such petition at the respondent's residence by delivering a copy thereof to his wife, he being at the time absent from the Province, is not sufficient.

Where a service made at the respondent's

**DOMINION CONTROVERTED ELECTIONS ACT**—Continued.

residence is relied upon to constitute a personal service, it should be clearly shewn that the petition came to the respondent's possession or knowledge.

Where an order was made under sec. 10 of the Act extending the time for service of a petition, and it was not served within the time allowed, the Court has no power afterwards to grant a further extension.

Sub-sec. 2 of sec. 32 of the Act, providing that an elector may be substituted for the petitioner in case of delay, only applies to a petition that has been properly served. *Per TUCK, J.*

*Per ALLEN, C. J.*—That as there was strong evidence that the respondent had left his residence to avoid being served with the petition, and the fair inference was that it had come to his knowledge, it ought not to be taken off the files of the Court, nor the petitioner adjudged to pay the costs of the application. *PALMER v. BAIRD*..... 42

—Recount—Restraining County Court Judge from proceeding with.....162

See **DOMINION ELECTIONS ACT**.

**DOMINION ELECTIONS ACT, 1874**—

*Nomination paper and deposit—Acceptance by Returning Officer—Power to reject after poll held—Recount of votes by County Court Judge—Prohibition to restrain Judge.*] The nomination paper required by "The Dominion Elections Act, 1874," sections 18, 19 and 21 (Rev. Stat. c. 8, sec. 21), need not be delivered to the Returning Officer, nor the deposit of \$200 be paid to him, by an agent of the candidate authorized in writing.

A nomination of a candidate, K., for the House of Commons, containing all the requisites of "The Dominion Elections Act, 1874," was duly delivered to the Returning Officer, the deposit paid to him, for which he gave a receipt, as required by sec. 19 of the Act. Another candidate, B., having been nominated, a poll was granted—the County returning but one member—and at the declaration of the several returns, it appeared that K. had the majority of the votes; but on B.'s objection that K. was not duly nominated, because his deposit was not paid by his duly authorized agent, the Returning Officer declared B. to be elected. Application was then made by K. to the Judge of the County Court, who granted an order appointing a time for a recount of the votes, under sec. 64 of cap. 8, Rev. Stat. Can.

*Held*—That though the act of the Returning Officer declaring B. to be elected was illegal, it was not a matter for a re-count of

**DOMINION ELECTIONS ACT, 1874**—Continued.

the votes polled, within the jurisdiction of the County Court Judge under sec. 64, and that a prohibition would lie to restrain him from proceeding therein.

*Per ALLEN, C. J., and WETMORE, J. (KING, J. contra)*, that the power of the Returning Officer to decide upon the sufficiency of K.'s nomination as a candidate, ceased when he accepted it, and granted the poll.

A Judge at Chambers has power to grant an order *nisi* for a prohibition returnable in Term, with a stay of proceedings in the meantime. *Ex parte BAIRD*.....162

**ELECTIONS ACT**—Dominion—Nomination paper and deposit—Returning officer—Recount—Prohibition.....162

See **DOMINION ELECTIONS ACT**.

—Provincial (Consol. Stat., cap. 5)—Form of petition—Service on respondents—How return should be made.....634

See **CONTROVERTED ELECTIONS ACT**.

**ELECTION PETITION**—Form of (Consol. Stat., cap. 5)—Return of service need not be through the Sheriff's office.....634

See **CONTROVERTED ELECTIONS ACT**.

—Service—Power of court to order petition off files, when not properly served—Extending time for service—Respondent evading service.....42

See **DOMINION CONTROVERTED ELECTIONS ACT**.

**ENTRY**—On land to take property wrongfully detained .....567

See **TRESPASS**.

**EQUITY**—Appeal—Service of notice of appeal .....560

See **PRACTICE**. 6.

—Court of—What words sufficient to describe in common law declaration.....620

See **SOLICITOR AND CLIENT**.

—Practice—Demurrer—Time for filing.487

See **PRACTICE**. 5.

—Practice—Demurrer—Where not appealed from—*Res judicata*.....340

See **CHOSE IN ACTION**.

**EQUITABLE INTEREST**—Chose in action—Assignment of.....340

See **CHOSE IN ACTION**.

**ERASURE**—Line through name of drawer of bill of exchange—Whether a material alteration ..... 420

See **BILL OF EXCHANGE**.

**ESCAPE**—Action against Sheriff for—Measure of damages—Admissions of debtor—Admissibility of ..... 449

See **SHERIFF**.

**ESTOPPEL**—Bill of sale of engine in mill—Substitution of new for old engine—Knowledge of grantee of old engine ..... 273

See **BILL OF SALE**.

**EVIDENCE**—*Bond given on settlement of suit against indorsers of note—Defence that indorsement was forged to plaintiff's knowledge—Evidence of statement by maker of note—Belief of plaintiff's counsel as to forgery when bond given—Cross-examination—Question arising out of examination in chief—Proof of handwriting—Opinion of witness.* The defence to an action on a bond was that defendants were induced to give the bond in order to stifle a prosecution against S. the maker of a note, for forging the defendants' names as indorsers thereon; which note was discounted by the Plaintiff Bank for S., and on which an action was pending against the defendants when the bond was given. The jury found that the defendants had indorsed, or authorized the indorsement of the note; and that they signed the bond voluntarily and without undue pressure by the plaintiff. Verdict for Plaintiff.

*Held, on motion for a new trial:*

Per **WETMORE, KING and TUCK, JJ.** (**ALLEN, C. J., and PALMER, J.,** dissenting on the latter ground).

1. That evidence of a statement by S. to the plaintiff's agent, that the indorsements on the notes were not forged, was not admissible, either as part of a conversation between the plaintiff's agent and S. given on cross-examination, or as evidence of the agent's belief that the indorsements were genuine, and that the taking of the bond was a *bona fide* transaction.

2. That evidence that the plaintiff had not given any instructions to prosecute S. for forgery was inadmissible. (**ALLEN, C. J., and PALMER, J.,** dissenting.)

3. That evidence of the belief of the plaintiff's counsel, who took part in the settlement when the bond was given, as to the genuineness of the plaintiff's claim in the action on the note, was improperly received. (**ALLEN, C. J., and PALMER, J.,** dissenting.)

4. Evidence of a witness that a signature purporting to be that of one of the indorsers on the notes was written by the same person

**EVIDENCE**—Continued.

who had signed a paper admitted to be genuine, but which paper was not then shewn to the witness, is admissible. (Per **ALLEN, C. J., WETMORE, PALMER and TUCK, JJ.**) **HALIFAX BANKING CO. v. SMITH.** ..... 462

—Action against City for injuries caused by defective sidewalk—Evidence of general condition of streets in City ..... 372

See **MUNICIPAL CORPORATION.** 5.

—Action by husband and wife for injuries sustained by wife—Where no count for loss of wife's services—Evidence as to what the wife devoted the money she earned—Admissibility of ..... 372

See **MUNICIPAL CORPORATION.** 5.

—Action against Sheriff for escape—Statements of debtor as to alleged fraudulent conveyances—Admissibility of—Whether statements of grantee admissible ..... 449

See **SHERIFF**.

—Correspondence between parties with a view to a settlement of claims—Admissibility of ..... 273

See **BILL OF SALE**.

—Cross-examination—Question arising out direct examination ..... 372

See **MUNICIPAL CORPORATION.** 5.

—Fishing during close season—Having fish in one's possession during prohibited season—Whether sufficient evidence of violation of Act ..... 271

See **FISHERIES ACT.** 1.

—Improper admission—Where immaterial—Of value under Rev. Stat., c. 164, sec. 18—Of sense in which words *prima facie* importing felony are used ..... 670

See **SLANDER**.

—Improper admission of—Where immaterial—Refusal of new trial ..... 372

See **MUNICIPAL CORPORATION.** 5.

—Of keeping intoxicating liquors for sale—Evidence of a sale ..... 543

See **CANADA TEMPERANCE ACT.** 4.

**EXCESSIVE DAMAGES**—New trial. 24  
See **FALSE IMPRISONMENT.**

**EXEMPTION**—From taxation—Whether Act 33 Vic., cap. 46, applies to the Fredericton and St. Mary's Railway Bridge Co. ... 127

See **RAILWAY COMPANY.** 3.

**EXTENSION OF TIME**—Service of election petition..... 42  
See DOMINION CONTROVERTED ELECTIONS ACT.

**FALSE IMPRISONMENT**—*Arrest for taxes already paid—Notice of assessment—Liability of Corporation for illegal arrest on execution issued by its officer—Respondent superior—Execution to levy on goods, or, in default, imprisonment—Arrest without searching for goods—Excessive damages—New trial.* Plaintiff (W. T. F.) having received a notice addressed to W. F., of assessment for taxes against him in the City of Portland, under the Act 48 Vic., c. 46, paid the amount to the Chamberlain of the City, who gave a receipt for the payment and credited it to W. F. in the Assessment Book. It afterwards appearing that the assessment against the plaintiff was unpaid, the Receiver of Taxes issued an execution against him for the amount, by which a constable was directed to levy on the plaintiff's goods and chattels, and in default of goods, to imprison him. The constable informed the plaintiff that he had the execution, and applied to him for payment, whereupon the plaintiff said that he had paid the taxes and had a receipt but had mislaid it, and it was never produced to the constable, who some months afterwards arrested the plaintiff and he then paid the taxes and was released. Having afterwards found the receipt, the plaintiff brought an action for false imprisonment against the City, and obtained a verdict for \$400 damages.

*Held*—(WETMORE, J., *dubitante*) 1. That even if the taxes paid by the plaintiff were not the taxes against himself, but the taxes of W. F., his arrest was wrongful for the following reasons:—(a) Because the execution directed the constable to arrest the plaintiff only in case of the want of goods and chattels whereon to levy the amount, and there was no evidence of want of goods and chattels; and (b) Because it was proved that the plaintiff had paid the identical taxes for the non-payment of which the execution issued.

2. That the execution having been issued by the Receiver of Taxes of the City, and delivered by him to the constable, the City—having received the amount of the taxes paid by the plaintiff to obtain his discharge from arrest—was liable for the wrongful arrest.

3. That the damages were excessive, and that a new trial should be granted unless the plaintiff consented to reduce them to \$100. Per WETMORE, J., that the action should have been brought in the County Court.

**FALSE IMPRISONMENT**—Continued.

Remarks of TUCK, J., on the case of *McSorley v. Mayor of St. John*, 6 Can. S. C. R. 531. FANJOY v. THE CITY OF PORTLAND. 24

—Action for, on arrest for debt after judgment thereon..... 572  
See JUSTICE'S COURT.

**FELLOW-SERVANT**—Injury to, caused by disobedience of orders by a fellow-servant—Liability of master..... 425  
See RAILWAY COMPANY. 4.

**FISHERIES ACT**—(R. S. C., c. 95)—*Conviction for fishing salmon during close season—Evidence—Appeal to Minister—Certiorari.* In order to convict a person of illegal fishing for salmon under sec. 8 of The Fisheries Act (Rev. Stat. Can., c. 95), it is not sufficient that the defendant had in his possession a salmon during the prohibited season. There must be some evidence to show when, where and in what manner the fish had been caught.

Sec. 18, sub-sec. 6, of the Act does not take away the right of *certiorari*. *Ex parte KELLY*..... 271

2—(R. S. C., c. 95)—*Fishery officer—Ex officio a Justice of the Peace—Trespass—Notice of action.* Where a fishery officer under The Fisheries Act (R. S. C. cap. 95, sec. 12) had improperly seized a quantity of fish as being illegally caught with seines:

*Held*, in an action against the officer, that as he was acting as a fishery officer in seizing the fish, and not as a Justice of the Peace, *ex officio*, under The Fisheries Act, he was not entitled to notice of action under The Consol. Statutes, cap. 90. O'BRIEN v. MILLER. 114

**FOOD**—Implied warranty that goods sold by sample are merchantable and fit for food. .... 675  
See SALE OF GOODS.

**FOREIGN CORPORATION**—Action on promissory note—Power to sue..... 501  
See INSURANCE. 1.

—Insurance company—Agent—Power to cancel policies ..... 501  
See INSURANCE. 1.

—Proof of—Evidence..... 501  
See INSURANCE. 1.

**FOREIGN LAW**—When action may be maintained in this Province for wrong committed abroad ..... 644  
See RAILWAY COMPANY. 1.

**FOREIGN STATE**—Consol. Stat., c. 46, sec. 12—State of Maine.....501  
See **INSURANCE**. 1.

**FORGERY**—Defence in action on bond given in settlement of suit against indorsers of note—Evidence of statement by maker of note—Belief of plaintiff's counsel as to forgery when bond was given.....462  
See **EVIDENCE**.

**FRAUD**—Failure to establish on application to set aside judgment by confession as fraudulent.....635  
See **JUDGMENT**.

**FREDERICTON, CITY OF**—*Municipality of York—County Buildings—Liability for expenses in connection therewith—Acts 42 Vic., cap. 41, and 45 Vic. cap. 65.] Held—by ALLEN, C. J., PALMER and KING, JJ., (WELDON, J. dissenting).*

That the Act 42 Vic. cap. 41, does not impose any liability upon the City of Fredericton to pay a portion of the expenses incurred by the County Council of York under Act 45 Vic., cap. 65, in fitting up offices for the Registrar of Deeds, and for the Sheriff and Clerk of the Peace for the County of York.

Per WELDON and WETMORE, JJ., that the City is liable for one third of the expenses in connection with the office of the Registrar of Deeds. **MUNICIPALITY OF YORK V. MAYOR, ETC., OF FREDERICTON** .....662

**GENERAL ISSUE**—County Court—Evidence.....295  
See **TROVER**. 3.

—Plea amounting to general issue—Setting aside as embarrassing.....217  
See **MUNICIPAL CORPORATION**. 3.

**HANDWRITING**—Proof of signature—Opinion of witness who had seen a genuine signature—Admissibility of.....462  
See **EVIDENCE**.

**HUSBAND AND WIFE**—Action by, for injuries sustained by wife—Where no count for loss of wife's services—Evidence as to what the wife devoted the money she earned—Admissibility of.....372  
See **MUNICIPAL CORPORATION**. 5.

—Wife dying intestate—Right of husband to personal property of deceased wife ... 70  
See **DISTRIBUTIONS, STATUTE OF**.

**ICE**—Sidewalk constructed on inclined plane—Foot passenger slipping on ice—Whether sidewalk properly constructed—Question for jury.....150  
See **MUNICIPAL CORPORATION**. 4.

**IMPRISONMENT**—In default of goods whereon to levy—Arrest without searching for goods.....24  
See **FALSE IMPRISONMENT**.

**INFORMATION**—Form of—Summary Convictions Act and Act 51 Vic., cap. 34. 130  
See **CANADA TEMPERANCE ACT**. 1.

**INSURANCE**—*Foreign corporation—Agent—Power to cancel policies—Action on promissory note given to foreign corporation—Proof of foreign corporation—Consol. Stat., c. 46, sec. 12.] Evidence that the agent of a foreign insurance company received applications for insurance and forwarded them to the company, collected the premiums, received and delivered the policies, and settled and paid the losses, does not authorize him to cancel policies issued by the company.*

Evidence that a foreign corporation was empowered to transact marine insurance, with the other powers incident to corporations, is sufficient to authorize them to sue on a promissory note given them for the premium on an insurance policy.

The State of Maine is a foreign state; and an Act of the Legislature of that State may, under the Consol. Stat., c. 46, sec. 12, be proved in this Province by a copy thereof, certified by the Secretary of the State, and under the seal thereof. **PALMER V. THE OCEAN MARINE INS. CO** .....501

2—*Marine—Policy—Prohibitory clause—Waiver—Sale of vessel by master—Stringent necessity—Constructive total loss—Notice of abandonment—Acceptance of—Breach of warranty—Restoration of ship—Admiralty charts—Names and location of places—Judicial notice of—New trial—Discovery of new evidence.] A condition of a policy of marine insurance,—after prohibiting the vessel from carrying in bulk, except under certain specified restrictions—declared as follows:—"Prohibited from loading lime, from the river and gulf of St. Lawrence (defining the bounds of the gulf, seaward), Northumberland Straits and Cape Breton, between October 31st and April 25th; permitted, however, to use gulf ports in Nova Scotia proper, up to November 15th, and the ports of Sydney C. B., and Pictou, N. S., until November 25th; from Newfoundland between November 25th and March 31st; from ports in Greenland or Iceland or being engaged in sealing; from*

**INSURANCE**—Continued.

the coast of Labrador, between September 15th and May 15th : ”

*Held*—that the prohibition was not limited to the loading of lime at the ports mentioned within the specified dates, but applied to the use of the prohibited waters, for any purpose during those periods.

The master of a vessel has no power to sell her so as to affect the insurers, except under circumstances of stringent necessity.

In order to convert that which was a constructive total loss at the time notice of abandonment was given, into a partial loss, the ship must either have been restored to the owner before the commencement of the action, or be in a position to be restored. (Per King and Tuck, J.J.)

Acceptance of notice of abandonment must be by some unequivocal act. Receipt of notice of abandonment by the agent of an insurance company, and his statement that he would forward it to his principal, and his belief that the loss would be paid, do not amount to acceptance of abandonment.

The Court will take judicial notice of the geographical position and names of places laid down in Admiralty Charts.

Where a policy of insurance required that an action against the underwriters should be brought within a year after the loss claimed for, and a writ was issued within the time, but the copy having been served on the wrong person, it was returned by the officer to the attorney who issued it, and he sent another copy, which was properly served—though after the year :

*Held*—Per Tuck, J., that the suit was commenced when the writ was first sent to the sheriff to be served.

Plaintiff obtained a verdict in an action against an insurance company, leave having been reserved to defendant to move to enter a non-suit, on the ground that there had been a breach of warranty by the plaintiff. On hearing the motion for that purpose, the defendant's counsel stated the existence of a letter in the plaintiff's possession, which the Court thought might operate as a waiver of the breach of warranty relied on as a ground of non-suit; and he also admitted that the plaintiff's counsel was not aware of the existence of the letter, at the trial. The Court (Palmer, J., dissenting), granted a new trial on payment of costs. *O'LEARY V. THE PELICAN INS. CO* .....510

**INTESTATE ESTATE**—Personal property of married woman—Husband's right to ..... 70

See DISTRIBUTIONS, STATUTE OF.

**IRREGULARITY**—Affidavit to hold to bail—Whether defence to action against Sheriff for an escape from arrest under *capias* issued upon it..... 449

See AFFIDAVIT.

**JOINT WRONG-DOERS**—Verdict against one—Agreement not to enforce judgment against him—Whether a release of others..... 407

See TROVER. 2.

**JUDGMENT**—By confession—Motion to set aside as fraudulent—Father and son—Application by judgment creditor—Failure to establish fraud—Delay.] A summary application by a judgment creditor of the defendant, to set aside a judgment by confession given by the defendant (the plaintiff's father), was refused—the applicant having failed to establish fraud and collusion between father and son.

Per PALMER, J., that it would have been more satisfactory to try the question of fraud by an issue.

Remarks on the delay in making the application. *NEILSON V. NEILSON* ..... 635

—By confession—In justice's court—Arrest on original debt..... 572

See JUSTICE'S COURT.

—Action of trover—Recovery without satisfaction—Vesting of property..... 407

See TROVER. 2.

—Verdict against joint tort-feasors—Agreement not to enforce judgment against one—Whether a release of others ..... 407

See TROVER. 2.

**JUDGMENT CREDITOR**—Motion by, to set aside judgment by confession as fraudulent—Application refused where failure to establish fraud and collusion—Delay in making application..... 635

See JUDGMENT.

**JUDGE'S ORDER**—Power of judge to vary order after having been acted upon... 119

See PRACTICE. 4.

**JUDICIAL NOTICE**—Geographical position and names of places laid down on Admiralty charts ..... 510

See INSURANCE. 2.

**JUROR**—Right of Judge to direct juror to stand aside..... 311

See MUNICIPAL CORPORATION. 1.

**JUSTICE OF THE PEACE**—Defendant confessing judgment in writing—Whether justice may sign judgment thereon, though neither party appears on the return of the summons. . . . .572

See **JUSTICE'S COURT**.

—Disqualification by relationship—*Bias* . . . . .543  
See **CANADA TEMPERANCE ACT**. 4.

—Fishery officer—*Ex officio* a Justice of the Peace—Whether entitled to notice of action. . . . .114

See **FISHERIES ACT**. 2.

**JUSTICE'S COURT**—*Suit on promissory note—Judgment by confession—Merger of claim on note—Subsequent arrest of maker—False imprisonment and malicious arrest—Probable cause—Direction of Judge to jury to find certain facts only—Entry of verdict upon the finding.*] In a suit before a Justice of the Peace, the defendant may confess judgment in writing, and the Justice may sign judgment thereon against the defendant, though neither party appears on the return of the summons. Per **ALLEN, C. J., WETMORE, PALMER and TUCK, JJ., KING, J.**, dissenting.

Per **ALLEN, C. J.**, that the defendant by giving the confession had waived his right to object to the Justice's jurisdiction on the ground that it did not appear that either the plaintiff or defendant resided in the same parish as the Justice, as directed by **Consol. Stat., cap. 60, sec. 6, and 42 Vic., cap. 13**.

Per **KING, J.**, that the judgment signed by the Justice was a nullity because neither party had appeared before him at the return of the summons; and per **KING and TUCK, JJ.**, that the Justice had no jurisdiction under **Consol. Stat., cap. 60, sec. 6**, on the question of non-residence.

Per **ALLEN, C. J., and PALMER, J.**, that the Courts of Justices of the Peace, not being Courts of Record, the original debt was not extinguished by the judgment signed on the confession, and that the creditor could sue again upon the original debt.

The creditor having afterwards arrested the debtor for the same debt,

*Held*, in an action for false imprisonment and malicious prosecution—1. That an action for false imprisonment would not lie, the *capias* on which the arrest was made being good in form, and issued by a Court having jurisdiction over the subject-matter.

2. That an action for malicious prosecution would not lie, either because the judgment on the confession was a nullity, or that the original debt was not merged in such judgment.

**JUSTICE'S COURT**—Continued.

3. That the defendant had reasonable and probable cause for arresting the plaintiff—the debt being due, and the jury having found that the defendant was not actuated by malice in arresting the plaintiff.

Where, in such an action, the jury answered certain questions left to them by the Judge, the effect of which was to negative malice in the defendant, the Judge may then direct the verdict to be entered for the defendant, though the jury, in answering the questions, stated at first that they found for the plaintiff.

*Wright v. Purlee* (3 Puga. 381), considered.  
**BYRAM V. JOHNSTON**. . . . .572

**LEVEL OF STREET**—Power to alter and amend street—Right to cut down and change grade . . . . .1

See **MUNICIPAL CORPORATION**. 2.

**LIMITATION OF ACTIONS**—Power of Parliament of Canada to legislate in respect to—*British North America Act*. . . . .588

See **RAILWAY COMPANY**. 2.

**LIQUOR LICENSE ACT**—*Spirituous Liquors—Right of Local Legislature to prohibit sale of—British North America Act, 1867.*] A mandamus was granted to compel the Council of a Municipality to hear and determine upon an application for a license to sell spirituous liquors under **The Liquor License Act, 1887 (Vic. 50, c. 4)**, where the Council had refused to do so on the ground that a majority of the rate-payers of the Parish for which the license was sought, had petitioned against it as provided for by section 31 of the Act. *Ex parte FOLEY*. . . . .113

**LIQUORS**—*Spirituous*—Right of Local Legislature to prohibit sale of. . . . .113

See **LIQUOR LICENSE ACT**.

**MAINTENANCE OF GRANTOR**—*Voluntary conveyance—Whether void as against creditors*. . . . .287

See **VOLUNTARY CONVEYANCE**.

**MALICE**—Corporation guilty of—*Pleading* . . . . .217

See **MUNICIPAL CORPORATION**. 3.

**MALICIOUS PROSECUTION**—*Action for—Jury negating malice—Right of Judge to direct verdict for plaintiff*. . . . .572

See **JUSTICE'S COURT**.



**MANDAMUS**—To compel Council of a Municipality to hear and determine upon an application for license to sell spirituous liquors.....113

See LIQUOR LICENSE ACT.

**MARITAL RIGHT**—Married woman dying intestate—Right of husband to personal property of deceased wife to the exclusion of next of kin.....70

See DISTRIBUTIONS, STATUTE OF.

**MARRIED WOMAN**—Personal property of, where dying intestate—Husband's right to—Next of kin.....70

See DISTRIBUTIONS, STATUTE OF.

**MASTER AND SERVANT**—Accident to servant—Disobedience of orders by fellow servant proximate cause of accident—Liability of master.....425

See RAILWAY COMPANY. 4.

—Subcontractors—Liability for negligence of servants.....644

See RAILWAY COMPANY. 1.

—Liability of corporation for illegal arrest on execution for taxes issued by its officer.....24

See FALSE IMPRISONMENT.

**MERGER**—Of original debt in judgment—When not.....572

See JUSTICE'S COURT.

**MISCHIEVOUS ANIMAL**—*Consol. Stat. cap. 111—Dog killing sheep—Action against owner—Scienter.*] In an action under *Consol. Stat., cap. 111*, against the owner of a dog for killing a sheep, it is not necessary to allege a *scienter*. *SMITH V. BUCK*.....268

**MISDIRECTION**—Where verdict right—Whether new trial will be granted.....670

See SLANDER.

**MISFEASANCE**—City of Portland—Action for injury occasioned by defect in sidewalk constructed by city—Liability of city for.....311

See MUNICIPAL CORPORATION. 1.

**MONCTON, TOWN OF**—Liability for non-repair of streets—Negligence.....372

See MUNICIPAL CORPORATION. 5.

**MUNICIPAL CORPORATION**—*City of Portland—Action for injury occasioned by defect in sidewalk—Misfeasance—Liability of city for—Notice of action—Whether necessary—Requirements of notice—Right of Judge to*

**MUNICIPAL CORPORATION**—Continued.

*direct a juror to stand aside.*] The City of Portland is liable for injury sustained by a person in falling through a defective plank in a sidewalk constructed by the city.

In the construction of various Acts of Assembly relating to the City of Portland, and Commissioners and Surveyors of Highways: *Held*, that notice of action to the City was not necessary before commencing a suit for the injury so sustained (*TUCK, J., dissenting*).

A letter from the plaintiff's attorney to the City authorities, notifying them of the injury to the plaintiff in consequence of the defective sidewalk, and stating his intention to claim damages for his injuries, and requesting the City to make inquiry into the circumstances, and to pay the plaintiff such damages as he is entitled to, does not contain any of the essentials of a statutory notice of action.

Where the Act incorporating the City of Portland declared that no rate-payer of the City should be deemed incompetent as a juror in actions in which the City was a party, the presiding Judge in an action against the City has no authority to order a juror who is regularly drawn from the list to stand aside because he is a rate-payer in the City (*FRASER, J., dissenting*). *CHRISTIE V. THE CITY OF PORTLAND*.....311

2—*City of Portland—Power to alter and amend streets—Right to cut down and change grade—Negligence.*] The Act 34 Vic, c. 11, incorporating the City of Portland, gave the City Council the control and management of the streets, with power "to open, lay out, regulate, repair, amend and clean the same."

The plaintiff's house fronted on one of the streets of the city, standing a few feet back from the line of the street, which at that place was lower than the land on which the house stood, and was reached by steps from the front of house. The Corporation, in altering the level of the street, cut it down some feet lower than it had been, and in doing so, took away the steps leading up to the plaintiff's house—the overseer of the work stating that they would be replaced. The plaintiff then, in order to get access to and from the street, placed planks from the front of his house to the street below, on an incline of about 30 degrees. In going from the house to the street upon these planks, the plaintiff's wife slipped and was injured.

*Held*—in an action against the city for the injury to the wife—(*PALMER, J., dissenting*), that the corporation was not liable, the alteration in the level of the street being authorized by the Act of incorporation, and

**MUNICIPAL CORPORATION** - Continued.

the work not having been done negligently.  
**WILLIAMS V. CITY OF PORTLAND**..... 1

3—*County Valuator—Wrongful dismissal—Liability of corporation—Pleadings—Malice—Power of two Valuators to act—Power of County Council to contract with Valuators.*] G. being duly qualified, was appointed by the County Council of Westmorland, one of the Valuers of the County, the term of office being for three years, by the Consol. Stat. cap. 100, sec. 35. During the term, the Council dismissed G. on the ground that he had, since his appointment, ceased to be a ratepayer on property, cap. 99, sec. 65 of the Statutes declaring that no person should be eligible to be appointed to any County office unless he was a ratepayer on property or income, and had paid his rates for the previous year. In an action by G. against the Municipality of the County for a wrongful dismissal, —*Held* on demurrer to the declaration :

1. By **PALMER, KING and FRASER, JJ.**, that a count alleging that the defendants wrongfully and maliciously dismissed the plaintiff was good.

By **ALLEN, C. J.**, that as the Council had exceeded its power in dismissing the plaintiff, the municipality was not liable.

By **TUCK, J.**, that though the members of the Council who voted for his dismissal might be liable for his wrongful dismissal, the municipality was not liable.

2. By **ALLEN, C. J., KING and FRASER, JJ.**, that a count stating a wrongful dismissal of the plaintiff, without stating that it was done maliciously, was good.

By **PALMER, J.**, that malice must be alleged in order to make the defendants liable.

By **TUCK, J.**, that the wrongful dismissal was, at most, an error in judgment of the Council, and that the defendants were not liable.

3. Where the statute provides for the appointment of three valuers, the Board of Valuers must be full before they can act; therefore a count alleging the wrongful refusal of the Council to allow the plaintiff and one other valuator to proceed with the work of valuation, is bad.

4. By **ALLEN, C. J., PALMER and FRASER, JJ.**, that a count alleging a contract by the Council to employ the plaintiff as valuator for the term of three years, for certain reasonable remuneration; that the plaintiff entered into the service of the defendants as such valuator, and that they afterwards wrongfully dismissed him, stated a cause of action.

**MUNICIPAL CORPORATION** - Continued.

By **KING and TUCK, JJ.**, that the appointment of valuers was obligatory on the Council by statute, and was the exercise of a public trust, and, therefore, did not create any contract between the plaintiff and the defendants, for breach of which an action would lie.

Plea amounting to the general issue. Setting aside plea as embarrassing under Consol. Stat., c. 37, s. 88. **GALLAGHER V. THE MUNICIPALITY OF WESTMORLAND**.....217

4—*Sidewalk constructed on inclined plane—Whether properly constructed—Foot passenger slipping on ice—Negligence—Question for jury.*] A sidewalk was constructed on a street in St. John running from east to west, a distance of 480 feet on a grade of about 8 feet in 100 feet. From the south line of the street the sidewalk also sloped northward to the gutter in various grades—at one point the slope being about one foot in eight. At this point, water from the land south of the street (which was higher than the sidewalk) was accustomed to run across the sidewalk to the gutter, and to freeze in winter and form ice on the sidewalk. The plaintiff, in walking upon the sidewalk at this point in the evening, slipped upon the ice and was injured. In an action against the city for damages, a nonsuit was granted on the ground that there was no evidence of negligence :

*Held*—per **ALLEN, C. J., PALMER and KING, JJ.**, (**FRASER and TUCK, JJ.**, dissenting)—That there was evidence which should have been left to the jury to find whether the defendants had been guilty of negligence in the construction of the sidewalk.] **DRISCOLL V. THE MAYOR, ETC., OF CITY OF SAINT JOHN**.....150

5—*Town of Moncton—Liability for non-repair of streets—Negligence—Where defect is caused by a wrong-doer—Evidence—Where immaterial—Cross-examination—Question arising out of direct examination—New trial.*] The Town of Moncton is liable for injury caused by non-repair of a sidewalk constructed by the Town; provided it has either actual or constructive notice of the defect.

The fact that the dangerous state of the sidewalk was caused by a wrong-doer does not relieve the town of its liability.

Per **TUCK, J.**—That there was no evidence from which the jury could reasonably infer that the defendants were guilty of negligence in not repairing the sidewalk.

In an action by husband and wife to recover damages for injuries sustained by the wife through defendants' negligence in not

**MUNICIPAL CORPORATION**—Continued.

repairing a street, where the declaration did not contain a count by the husband for loss of his wife's services, she was asked on direct examination, to what she devoted the money she earned? to which she replied, that it went to her children, and the support of her family, for things for the house:

*Held* by WETMORE, PALMER and FRASER, JJ. (ALLEN, C. J., and KING, J., dissenting), that the evidence was immaterial, and was not a ground for a new trial.

In such action the Mayor of the Town gave evidence for the defendants, of the care with which the officials looked after the streets:

*Held* per WETMORE, PALMER, KING and FRASER, JJ., (ALLEN, C. J., dubitante), that he might be asked on cross-examination, if he knew on what street a person had fallen and was injured, and for which an action was brought—such question arising out of the direct examination. CAMERON v. TOWN OF MONCTON.....372

**MUNICIPALITY**—Council of, compelled by Mandamus to hear and determine upon an application for license to sell spirituous liquors.....113

See LIQUOR LICENSE ACT.

—of York—Liability of for fitting up offices of Registrar of Deeds, and for Sheriff and Clerk of the Peace under 45 Vic. c. 65....662

See FREDERICTON, CITY OF.

**NEGLIGENCE**—Action for, in conducting a suit—Pleading.....620

See SOLICITOR AND CLIENT.

—Alteration of level of street—Injury to owner of house in going to street where level changed.....1

See MUNICIPAL CORPORATION. 2.

—Contributory—Where hay exposed below sills of barn near Railroad—Whether plaintiff not taking any means to protect it, is evidence of, to be left to the Jury....644

See RAILWAY COMPANY. 1.

—In construction of sidewalk—Question for Jury.....150

See MUNICIPAL CORPORATION. 4.

—In construction of bridge by a railway company—Liability for death of workman caused by defect.....425

See RAILWAY COMPANY. 4.

—Liability of sub-contractor for negligence of his servants.....644

See RAILWAY COMPANY. 1.

**NEGLIGENCE**—Continued.

—Non-repair of street—Where defect is caused by a wrong-doer....372

See MUNICIPAL CORPORATION. 5.

—Railway Company not erecting fences and cattle guards—Action for damages resulting therefrom.....588

See RAILWAY COMPANY. 2.

**NEW EVIDENCE**—Admission of existence of, by opposite counsel on argument—New trial.....510

See INSURANCE. 2.

—Discovery of—Amending notice of motion for new trial.....570

See PRACTICE. 3.

**NEW TRIAL**—Discovery of new evidence.....510

See INSURANCE. 2.

—Excessive damages.....24

See FALSE IMPRISONMENT.

—Improper admission of evidence—Where immaterial.....372

See MUNICIPAL CORPORATION. 5.

—Misdirection—Where slight and verdict is considered to be in accordance with facts—Whether new trial.....670

See SLANDER.

—Notice of motion—Amendment of—Adding new ground.....570

See PRACTICE. 3.

**NEXT OF KIN**—Married woman dying intestate—Rights of husband.....70

See DISTRIBUTIONS, STATUTE OF.

**NOMINATION PAPER**—Deposit—Acceptance by Returning Officer—Power to reject after poll held.....162

See DOMINION ELECTIONS ACT.

**NOTICE OF ACTION**—Fishery officer under Rev. Stat. Can. cap. 93, ex officio a Justice of the Peace—Trespass for improper seizure.....114

See FISHERIES ACT. 2.

—Requirements of notice—Whether notice necessary before action against City of Portland for injury caused by defect in sidewalk.....311

See MUNICIPAL CORPORATION. 1.

**NOTICE OF MOTION**—For new trial—  
Amendment of.....570  
See PRACTICE. 3.

**OFFICER**—Of Municipal Corporation—  
Wrongful dismissal—Liability of Corpora-  
tion.....217  
See MUNICIPAL CORPORATION. 3.

**ORDER**—Of Judge—Varying order—Time  
for application.....119  
See PRACTICE. 4.

**OVERSEERS OF THE POOR**—*Relief of French poor—Right of Action for—Consol. Stat. cap. 99, sec. 67, and cap. 102, sec. 3.* The overseers of the poor in a Parish in which overseers for the French inhabitants have also been elected under Consol. Stat. cap. 99, sec. 67, cannot, under cap. 102, sec. 3, recover from the latter overseers for relief provided to a French pauper in that Parish. **OVERSEERS OF THE POOR FOR THE PARISH OF MONCTON V. OVERSEERS OF THE POOR FOR THE FRENCH INHABITANTS OF MONCTON.**.....632

**PARTIES**—Suit for an account—Objection for want of parties, when taken.....340  
See CHOSE IN ACTION.

**PAUPER**—Action for relief of French by Overseers—Consol. Stat. cap. 99 sec. 67, and cap. 102 sec. 3. ....632  
See OVERSEERS OF THE POOR.

**PENALTY**—Summary Convictions Act—To whom penalty must be paid .....123  
See SUMMARY CONVICTION.

**PLEA**—General Issue—Setting aside as embarrassing under Consol. Stat. cap. 37 sec. 88  
.....217  
See MUNICIPAL CORPORATION. 3.

**PLEADING**—Action against Municipal Corporation for wrongful dismissal of County Valuator—Malice—Contract .....217  
See MUNICIPAL CORPORATION. 3.

—Action against owner of a dog for killing sheep—Scienter. ....268  
See MISCHIEVOUS ANIMAL.

—Action for negligence in conducting a suit—Necessary averments in declaration. 620  
See SOLICITOR AND CLIENT.

—County Court—General issue in Trover. ....295  
See TROVER. 3.

**PLEADING**—Continued.

—Power of Parliament of Canada to legislate in respect to .....588  
See RAILWAY COMPANY. 2.

—Trespass to land—Entering to take property wrongfully detained by plaintiff....567  
See TRESPASS.

**POLICY**—Marine insurance—Prohibitory clause—Construction of.....510  
See INSURANCE. 2.

—Marine insurance—Foreign corporation—Power of agent to cancel.....510  
See INSURANCE. 2.

**POOR**—Relief of French inhabitants of Moncton—Right of action for—Consol. Stat., cap. 99, sec. 67, and cap. 102, sec. 3....632  
See OVERSEERS OF THE POOR.

**PORTLAND, CITY OF**—Power to alter and amend streets—Right to cut down and change grade—Negligence.....1  
See MUNICIPAL CORPORATION. 2.

**PRACTICE**—*Action brought in County Court and transferred to Supreme Court—Amount recovered within the jurisdiction of County Court—Whether certificate for costs can be granted.* Where an action of assumpsit brought in the County Court was transferred to the Supreme Court by the County Court Judge, and no greater amount was recovered than might have been recovered in the County Court, the plaintiff is entitled to Supreme Court costs without a certificate of the Judge. (WETMORE, J., *dubitante*.)

The action not having been "brought" in the Supreme Court, is not a case where a certificate can be granted, under the Act 49 Vic. c. 18. O'DOHERTY V. BICKFORD. 116

2—*Affidavit to hold to bail—Statement of cause of action—Certainty of.* An affidavit to hold to bail should be direct and positive as to the existence of a cause of action.

Therefore, an affidavit to hold the master of a vessel to bail in an action for negligently losing a scow, which stated that the scow had been taken to the vessel with deals for loading, and made fast thereto, and taken charge of by the master, but only alleged the negligence of the master, and consequent loss of the scow, as matter of information and belief, was held insufficient.

Per PALMER, J. That if the affidavit alleged facts that were reasonable evidence of a cause of action, sufficient to satisfy the

**PRACTICE** — Continued.

Judge who ordered the arrest, it was sufficient. *SAYRE V. WILLIAMS*. . . . .531

3—*Amendment of notice of motion for new trial—Adding new ground.*] Amendment of a notice of motion for a new trial allowed on payment of costs, by adding, as a ground, the discovery of new evidence.

Per TUCK, J., that the applicant was entitled to amend without costs, as a matter of right. *INCH V. FLEWELLING*. . . . .570

4—*County Court—Postponing trial on usual terms of paying costs—Settlement of cause after service of order—Power of Judge afterwards to vary order so as to include the costs of opposing postponement.*] The trial of a cause in the County Court was postponed by the Judge "on the usual terms of paying costs." The order served, directed the defendant to "pay to the plaintiff any costs he had been put to in preparing for trial." The parties then settled the cause on the terms that the defendant should pay the taxable costs; but before the costs were taxed, the County Court Judge, on application of the plaintiff, amended his order so as to include the plaintiff's costs of opposing the postponement.

*Held*, that the original order having been acted upon, the Judge had no power afterwards to vary it, even though it did not express his intention on the motion for the postponement. *NOONAN V. THE BANK OF BRITISH NORTH AMERICA*. . . . .119

5—*Equity—Demurrer—Time for filing—Consol. Stat., cap. 49, secs. 2 and 28—Act 45 Vic. cap. 8, sec. 4.*] Where a demurrer had been ordered to be taken off file because it was not filed within a month after service of a copy of the Bill and interrogatories on the defendant, according to the Consol. Stat., cap. 49, sec. 28:

*Held*—Per King, Fraser and Tuck, JJ. (Allen, C. J., dissenting), that the practice was altered by the Act 45 Vic., cap. 8, sec. 4, and that a demurrer could be filed without a Judge's order, after the expiration of a month from the service of the Bill, etc., and within ten days after demand of a plea, answer, etc., served on the defendant. *BURPEE V. WATMORE*. . . . .487

6—*Equity appeal—Service of notice of appeal.*] The Court has no jurisdiction to extend the time for appealing from a decree in Equity, unless notice of appeal has been served on the Judge who made the decree, within the time directed by the Consol. Stat., cap. 49, sec. 61. *HARRISON V. THE NORTHERN AND WESTERN RAILWAY COMPANY*. . . . .660

**PRACTICE** — Continued.

—Commencement of suit—Time of—Where writ served on wrong person. . . . .510  
See *INSURANCE*. 2.

—Costs—Review of taxation. . . . .403  
See *COSTS*.

—Entry of verdict upon finding certain facts by jury as directed by the Judge. . . .572  
See *JUSTICE'S COURT*.

—Equity—Questions decided on demurrer—Whether can be renewed on hearing of case. . . . .340  
See *CHORE IN ACTION*.

—Judge directing juror to stand aside—When juror not incompetent to act. . . .311  
See *MUNICIPAL CORPORATION*. 1.

—Limitation of action against railway company. . . . .588  
See *RAILWAY COMPANY*. 2.

—Misdirection—New trial. . . . .670  
See *SLANDER*.

—New trial—Excessive damages. . . . .24  
See *FALSE IMPRISONMENT*.

—Notice of action—Requirements of. . .311  
See *MUNICIPAL CORPORATION*. 1.

—Power of a Judge at Chambers to grant an order *nisi* for a prohibition—Staying proceedings. . . . .162  
See *DOMINION ELECTIONS ACT*.

—Sufficiency of count in action for negligence in conducting a suit. . . . .620  
See *SOLICITOR AND CLIENT*.

—Verdict against one of several tortfeasors—Whether others can compel plaintiff to sign judgment. . . . .407  
See *TROVER*. 2.

**PROHIBITION**—Power of Judge to grant order *nisi* at chambers—Staying proceedings. . . . .162  
See *DOMINION ELECTIONS ACT*.

—To restrain County Court Judge from proceeding with recount of votes polled for candidate under Dominion Elections Act. 162  
See *DOMINION ELECTIONS ACT*.

**PROHIBITION**—Continued.

—To restrain County Court Judge from proceeding with recount of votes polled for candidate under Dominion Elections Act. 200

See **CONTEMPT**.

**PROMISSORY NOTE**—Given to Foreign Corporation—Power of corporation to sue.

..... 501

See **INSURANCE**. 1.

—Line through name of drawer of Bill of Exchange—Whether a material alteration. .... 420

See **BILL OF EXCHANGE**.

—Merger of claim in judgment. .... 572

See **JUSTICE'S COURT**.

**QUESTION FOR JURY**—Voluntary conveyance securing maintenance and support of grantor—Intention of parties. .... 287

See **VOLUNTARY CONVEYANCE**.

—Where jury answer questions left to them by Judge in a manner to negative malice in defendant, Judge may direct verdict to be entered for the defendant. .... 572

See **JUSTICE'S COURT**.

—Whether sidewalk properly constructed—Action for damages against city for injury sustained by reason of defective sidewalk ..... 150

See **MUNICIPAL CORPORATION**. 4.

**RAILWAY COMPANY**—*Barn burnt by sparks from engine—Defective smokestack—Hay exposed below sills of barn—Contributory negligence—Liability of sub-contractors for negligence of servants—Tort committed in Quebec—Action for.*] A line of railway was laid out through plaintiff's land on which was a barn containing hay. The sills of the barn rested on blocks and were about 8 inches above the ground on which the hay rested, so that part of it was exposed below the sills. A small part of the barn was within the line of the land taken for the railway, and about 45 feet from the track. In the construction of the railway and while an engine, with a defective smokestack, was passing near plaintiff's barn (the wind blowing strongly) sparks ignited the hay and destroyed the barn.

*Held*—(ALLEN, C. J., and WETMORE, J., dissenting), that the fact of the plaintiff not taking any means to protect the hay, was not evidence of contributory negligence on his part, and need not have been left to the jury.

Contractors with a railway Company for

**RAILWAY COMPANY**—Continued.

the construction of a railway, are liable for injuries caused by negligence of their servants in running their train.

An action may be maintained in this Province for a wrong committed abroad, if, at the time the action is brought here, the wrong complained of was actionable according to the laws of the Country where committed. CAMPBELL V. MCGREGOR. .... 644

2—*Breach of statutory duty—Neglecting to erect fences and cattle guards—Action for damages resulting therefrom—Dominion Railway Act 42 Vic., cap. 9, sec. 27—Inconsistent legislation of Dominion statute and Provincial Act—British North American Act, sec. 92—Limitation of action—Civil rights—Ultra vires.*] The New Brunswick Railway Co. was incorporated before the union of the Provinces under The British North America Act, by the Provincial statute 33 Vic., cap. 49, the 14th sec. of which required the Company to erect and maintain substantial fences on each side of the land taken by them for the railway where it passed through improved land. The 92nd sec. of The British North America Act having excluded from the Provincial Legislatures power over local works which, though wholly within a Province of the Dominion, were declared by the Parliament of Canada to be for the general advantage of Canada, and the Dominion Act 44 Vic., cap. 42, having declared the work of The New Brunswick Railway Co. to be a work for the general advantage of Canada; and the provisions of the Consolidated Railway Act, 1879, having been extended to The New Brunswick Railway Co., so far as they were applicable to the undertaking, and not inconsistent with the several Acts of the Company:

*Held*, 1st. That sec. 13 of "The Railway Act" (Rev. Stat. Can., cap. 109), relating to fencing, was inconsistent with sec. 14 of The New Brunswick Railway Act, and therefore that the Company was bound under the Act of incorporation, to erect the fences without any written request from the occupant of the land, as provided by sec. 13 of "The Railway Act."

2nd. That Parliament having the exclusive right to legislate on the subject of railways, had, as incident thereto, power to limit the time within which actions could be brought for damages sustained by reason of the railway; and therefore that sec. 27 of cap. 109, which limited the right of action to six months after the alleged damage was sustained, was not *ultra vires*. (WETMORE, J., dissenting.)

3rd. That the words of sec. 27—"injury

**RAILWAY COMPANY**—Continued.

sustained by reason of the railway"—were not confined to neglect in running the trains, nor to improper construction of the railway, but extended to damage arising from the improper construction of cattle guards, and from neglect to fence the railway, as directed. (WETMORE, J., dissenting.)

*Quere*—Whether that part of sec. 27 which authorizes the Railway Company, in an action for damage, to plead the general issue and give the special matter in evidence, is *ultra vires*.

4th. If damage is sustained by a person in consequence of the neglect of the Railway Company to erect fences on each side of the railway, as directed by Act 33 Vic., cap. 49, sec. 14, an action will lie therefor. *Couch v. Steel*, 3 E. & B. 402, followed.

*Quere*—Whether an action could have been maintained if the statute had imposed a penalty for neglecting to erect fences. *LEVESQUE v. NEW BRUNSWICK RAILWAY COMPANY*.....588

3—*Fredericton and St. Mary's Railway Bridge Company*—*Whether a Railway Company within 33 Vic. cap. 46—Exemption from Taxation*] The Fredericton and St. Mary's Railway Bridge Company incorporated by Dominion Act 48 & 49 Vic. cap. 26, is a Railway Company within the meaning of the Act of Assembly 33 Vic. cap. 46; and is exempt from taxation under the provisions of that Act. *Ex parte THE FREDERICTON AND ST. MARY'S RAILWAY BRIDGE COMPANY*.....127

4—*Negligent construction of bridge—Liability for death of workman caused by the defect—Master and servant—Disobedience of orders by fellow-servant—Proximate cause of accident—Contributory negligence—Liability of master—Misdirection.*] In an action against a Railway Company to recover damages for the death of a workman in their employ, while being carried on one of their engines, it was proved that during the night preceding the accident, the ice in the river over which the bridge crossed had, in consequence of a heavy gale and high tide, been forced against the piers of the bridge, displacing some of them; by reason of which the engine broke through the bridge and the workman was killed.

*Held*, that the jury were properly directed, that the defendants were only bound in the construction of the bridge, to provide against dangers that could reasonably be foreseen by reasonable men in the exercise of ordinary sagacity; but if the bridge was so constructed that it was destroyed by a storm

**RAILWAY COMPANY**—Continued.

such as might reasonably have been anticipated to occur, the defendants would be liable.

Where there was evidence that the manager of the railway had directed the conductor of the train and the engine driver on the day of the accident, not to cross the bridge until it was examined, which order they disobeyed:—

*Held*, that as the conductor and the engine driver were the fellow-servants of the deceased, it should have been left to the jury to find whether their disobedience of the order was the proximate cause of his death. (FRASER, J., dissenting.)

Though a railway bridge is defectively constructed, yet if a person goes upon it contrary to directions, and with notice of the danger, and is injured, he cannot recover damages against the company for the injury. (FRASER, J., dissenting.) *CARNEY v. THE CARAQUET RY. CO.*.....425

**RECOUNT**—Dominion Elections Act—Returning officer rejecting nomination paper after poll held—Prohibition to restrain County Court Judge from proceeding with recount .....162

See DOMINION ELECTIONS ACT.

**REGISTRAR OF DEEDS**—Liability of Municipality of York for fitting up offices for—42 Vic., cap. 41, and 45 Vic., cap. 65.....662

See FREDERICTON, CITY OF.

**RELEASE**—Joint tort-feasors—Verdict against one—Agreement not to enforce—Whether a release of others.....407

See TROVER. 2.

**RELATIONSHIP**—Disqualification—Justice of the Peace.....543

See CANADA TEMPERANCE ACT. 4.

**RES JUDICATA**—Equity—Questions determined on demurrer—Where not appealed from.....340

See CHOSE IN ACTION.

**RETAINER**—Allegation of, in action by client against solicitor for negligence in conducting a suit.....620

See SOLICITOR AND CLIENT.

**RETURN**—Election petition (Consol. Stat., cap. 5)—Whether must be through sheriff's office.....634

See CONTROVERTED ELECTIONS ACT.

**RETURNING OFFICER**—Dominion Elections Act—Sufficiency of nomination of candidate—Power to reject nomination after poll held.....162  
See DOMINION ELECTIONS ACT.

**REVIEW OF TAXATION**—Equity—Appeal.....403  
See COSTS.

**SALE OF GOODS**—*By sample*—Articles of food—*Implied warranty.*] The defendant, a manufacturer of canned goods in this Province, sent to the plaintiff, in New York, samples of his goods, which the plaintiff acknowledged the receipt of, stating that they were satisfactory, and ordering a quantity at the price named by the defendant, which he paid. When the lobsters were received by the plaintiff, soon after the order given, they were found on examination to be of bad quality and unfit for food. In an action for breach of warranty:—

*Held*—That there was an implied warranty that the lobsters supplied were merchantable and fit for food. *LEGETT v. YOUNG*....675

—Tenants in common of chattels—Sale of interest of one co-tenant under execution.295  
See TROVER. 3.

**SALMON**—Conviction for fishing during close season—Evidence.....271  
See FISHERIES ACT. 1.

**SAMPLE**—Implied warranty that goods sold by sample are merchantable and fit for food.....675  
See SALE OF GOODS.

**SCIENTER**—Action against owner of a dog for killing sheep—Pleading.....268  
See MISCHIEVOUS ANIMAL.

**SELLING**—Intoxicating liquors—Evidence of keeping.....543  
See CANADA TEMPERANCE ACT. 4.

**SERVICE**—Election petition—Return of (Consol. Stat., cap. 5).....634  
See CONTROVERTED ELECTIONS ACT.

—Election petition—Extending time for—Respondent evading service.....42  
See DOMINION CONTROVERTED ELECTIONS ACT.

**SHEEP**—Dog killing—Action against owner of dog—*Scienter*.....268  
See MISCHIEVOUS ANIMAL.

**SHERIFF**—*Action for escape—Measure of damages—Evidence—Statement of debtor as to alleged fraudulent conveyances—Admissibility of.*] In an action against a sheriff for an escape, the jury in assessing the damages may take into consideration not only the defendant's own resources, but all reasonable probabilities founded on his position in life that the debt would have been discharged. *Per KING, J.*

In such an action the admissions of the debtor before his escape as to the fraudulent character of certain conveyances made by him are admissible.

But the declarations of the grantee on that subject are not admissible. (*TUCK, J.*, dissenting.) *McMANUS v. WELLS*.....449

—Action for escape—Where affidavit to hold to bail is irregular—Whether a defence in action against sheriff.....449

See AFFIDAVIT.

—Repairs to office for—County of York—Liability for expenses.....662  
See FREDERICTON, CITY OF.

**SHIP**—Sale of, by master—Stringent necessity.....510  
See INSURANCE. 2.

—Verdict against master for conversion of cargo—Subsequent action against the ship-owners—Whether owners can compel plaintiff to sign judgment against the master.407  
See TROVER. 2.

**SLANDER**—*Charge of stealing trees—Sense in which the words were used—Ownership of the trees—Proof of value—Improper admission of immaterial evidence—Mistake—New trial.*] If words *prima facie* importing felony are used in a different sense, they are not actionable.

Defendant finding plaintiff cutting trees on land claimed by him, charged the plaintiff with stealing. The charge was made in the presence of the plaintiff's brother, who knew that it related to the cutting of the trees, and that the plaintiff also claimed them:—

*Held*—that the words used imported a charge of trespass, and not a felony.

In an action for slander in charging plaintiff with stealing trees, evidence is admissible on the part of the defendant to shew that the trees were not worth \$25—the amount required by the Rev. Stat. c. 164, sec. 18, to make the cutting of trees, with intent to steal, a felony. *HERRINGTON v. McBay*.....670



**SOLICITOR AND CLIENT**—*Action for negligence in conducting a suit—Retainer—Pleading.*] In an action against a solicitor for negligence in conducting a suit, it is sufficient to state in the declaration that he was retained as a solicitor to conduct a suit in equity: the reasonable intendment of the words being, that the suit was in the Court of Equity of this Province, and that the defendant was a solicitor of that Court. (PALMER, J., dissenting).

In such an action, it is sufficient in the declaration to allege that the defendant was retained as a solicitor, without stating that he was retained for reward.

A count alleged that the plaintiff at the defendant's request retained and employed him as a solicitor to commence and conduct a certain suit, yet the defendant, although he accepted the retainer, "colluded and wrongfully combined with the opposite party's counsel in the suit to prevent the plaintiff from recovering," and entered into an agreement by which the plaintiff was put to great loss:

*Held*, that the count stated a good cause of action. CLARK V. BAIRD.....620

**SPIRITUOUS LIQUORS**—Right of Local Legislature to prohibit sale of—British North America Act, 1867.....113

See LIQUOR LICENSE ACT.

## STATUTE OF DISTRIBUTIONS.

See DISTRIBUTIONS, STATUTE OF.

**STATUTORY DUTY**—Breach of—Liability for damages resulting therefrom.. 588

See RAILWAY COMPANY. 2.

**STAYING PROCEEDINGS**—Order *nisi* restraining County Court Judge from proceeding to the recount of votes polled for candidate under Dominion Elections Act. 200

See CONTEMPT.

**STREET**—Defective sidewalk—Misfeasance—Injury to foot passenger.....311

See MUNICIPAL CORPORATION. 1.

—Power to alter and amend—Right to cut down and change grade..... 1

See MUNICIPAL CORPORATION. 2.

—Sidewalk constructed on inclined plane—Whether properly constructed—Question for jury.....150

See MUNICIPAL CORPORATION. 4.

—Where defect is caused by wrongdoer—

**STREET**—Continued.

Liability of Town of Moncton for non-repair.....372

See MUNICIPAL CORPORATION. 5.

**SUBSTITUTED PROPERTY**—Engine in mill—Substitution of new for old.....273

See BILL OF SALE.

**SUMMARY CONVICTION**—*Conviction adjudging a penalty and costs—Who entitled to receive them.*] The penalty and costs adjudged to be paid by a conviction under The Summary Convictions Act, must be paid to the convicting Justice, and not to the prosecutor.

Per PALMER J., that the costs may be paid to the prosecutor. *Ex parte* WALLACE..123

—Costs of commitment and conveying defendant to gaol in a conviction under Canada Temperance Act..... 133, 144

See CANADA TEMPERANCE ACT. 2 AND 3.

—Form of information—When imperative.....130

See CANADA TEMPERANCE ACT. 1.

**TAXATION OF COSTS**—Review of..403

See COSTS.

**TAXES**—Arrest for, where already paid—

Liability of corporation..... 24

See FALSE IMPRISONMENT.

—Exemption—Whether Fredericton and St. Mary's Railway Bridge Co. is a railway company within Act 33 Vic., cap. 46..127

See RAILWAY COMPANY. 3.

**TENANT IN COMMON**—Chattel—Sale of interest of one co-tenant under execution—Conversion.....295

See TROVER. 3.

**TORT**—Action for damages where wrong committed abroad.....644

See RAILWAY COMPANY. 1.

**TRESPASS**—*To land—Entry to take property wrongfully detained by plaintiff—Pleading.*] A plea in trespass justifying an entry upon land to retake logs of the defendant, alleged that the same were wrongfully detained by the plaintiff, and that the defendant entered and took them away, doing no unnecessary damage:

*Held*, on demurrer, that the plea was good. TURNER V. SMITH.....567

**TRIAL**—Postponing of, on usual terms of paying costs—Settlement of cause—Power of Judge to afterwards vary order.....119  
See PRACTICE. 4.

**TROVER**—Bill of exchange delivered to Bank by plaintiff to discount—Plaintiff indebted to Bank—Right of Bank to appropriate proceeds in payment of indebtedness—*Conversion*.] Plaintiff drew and indorsed a bill of exchange and delivered it to the defendants to discount, which they agreed to do if the bill was accepted. After acceptance, the defendants refused to give the plaintiff either the proceeds or the bill, claiming the right to apply it to the payment of a debt which the plaintiff owed them:

*Held*, that the defendants were liable in trover for a conversion of the bill.

A discount means an advance of money, upon the transfer of a negotiable instrument to the Bank, payable at a future day, as security. **LANDRY V. BANK OF NOVA SCOTIA**.....564

2—*Conversion of cargo of a vessel—Verdict against the master—Subsequent action against the ship-owners—Whether owners can compel plaintiff to sign judgment against master—Joint tort-feasors—Agreement not to enforce judgment against one—Whether a release of others—Pleading—Trover—Recovery, without satisfaction—Judgment.*] The owner of a cargo of coal recovered a verdict against the master of the vessel for wrongful conversion of it, but did not sign judgment. He afterwards brought an action against the owners of the vessel for the wrongful act of the master, whereupon one of the defendants applied to stay the proceedings until the plaintiff signed judgment in the action against the master, in order that such defendant might plead the judgment recovered, as an answer to the action against him:

*Held*—That the plaintiff was entitled to discontinue the suit against the master of the vessel, and that the defendant in the action against the owners had no right to require the plaintiff to sign the judgment in the action against the master.

An agreement between the plaintiff and the master of the vessel, that in consideration of plaintiff not proceeding with the suit, the master would not in any way attempt to force the plaintiff to sign judgment therein, does not operate as a release of the suit against the master.

One of several wrong-doers against whom a verdict has been obtained, has a right to agree with the plaintiff that he shall not be obliged to sign judgment on his verdict.

**TROVER**—Continued.

A judgment against the defendant in an action of trover without satisfaction does not vest the property in the goods in the defendant. **BUSBY V. SCHOFIELD**.....407

3—*Tenants in common of chattel—Sale of interest of one co-tenant under execution—Conversion—Pleading in County Court—General issue in trover.*] A. and B. owned a horse as their joint property, and while it was in B's possession it was seized by a constable under an execution issued on a judgment recovered against B. in a Justice's Court at the suit of C. The constable afterwards, by direction of C., sold the horse as the property of B.

In an action of trover by A. against C. and the constable:

*Held*—By ALLEN, C. J., PALMER and KING, JJ., that the sale by the constable only conveyed the interest of B. in the horse, and did not amount to a conversion, though the constable professed to sell the horse as the sole property of B. there being nothing to prevent A. from still exercising his right as a part owner of the horse.

Per TUCK, J., that it was a question which ought to have been left to the jury whether the horse had been sold in such a manner as to prevent A. from exercising his right in it as a joint owner.

Per ALLEN, C. J., and TUCK, J., that the judgment and execution against B. were admissible in evidence under the plea of "not guilty"—the action being in the County Court. **PRESCOTT V. MOORE**.....295

—Bill of sale of engine in mill—Substitution of new for old engine—Bill of sale to vendor of new engine to secure purchase money—Trover for old engine against vendor of new engine.....273

See BILL OF SALE.

**ULTRA VIRES**—Power of Local Legislature to prohibit sale of spirituous liquors.....113

See LIQUOR LICENSE ACT.

—Whether sec. 27 of Rev. Stat., Can. is *ultra vires*.....588

See RAILWAY COMPANY. 2.

**VOLUNTARY CONVEYANCE**—*Securing maintenance and support of grantor—Whether void as against creditors—Intention of parties—Question for jury.*] Where the consideration of a conveyance of land is an agreement to support the grantor (the conveyance being of all the grantor's property), and it is made *bona fide*, with no intention to defeat

**VOLUNTARY CONVEYANCE**—Continued.  
 or delay creditors, and the grantee has no knowledge that the grantor is indebted at the time, such a deed is good, even though the effect of it may be to prevent creditors getting their pay. The intention of the parties under all the circumstances is the fact to be determined by the jury. *Doe dem. KEITH v. COREY*.....287

**WAIVER**—Breach of warranty.....510  
 See **INSURANCE**. 2.

**WARRANTY**—Where goods sold by sample—Implied warranty that they are merchantable and fit for food.....675  
 See **SALE OF GOODS**.

**WITNESS**—Refusal to give evidence—Examination of debtor—Consol. Stat. cap. 38, sec. 22—Attachment for contempt...205  
 See **DEBTOR**.

**WORDS**—Sense in which used.....670  
 See **SLANDER**.

**WRONG-DOER**—Defective state of streets caused by—Liability of City for.....372  
 See **MUNICIPAL CORPORATION**. 5.

—Verdict against one—Whether agreement not to enforce judgment against him is a release of others.....407  
 See **TROVER**. 2.

*8x 26. IV. 6.*















